TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925

No. 198

THE CHEROKEE NATION, APPELLANT,

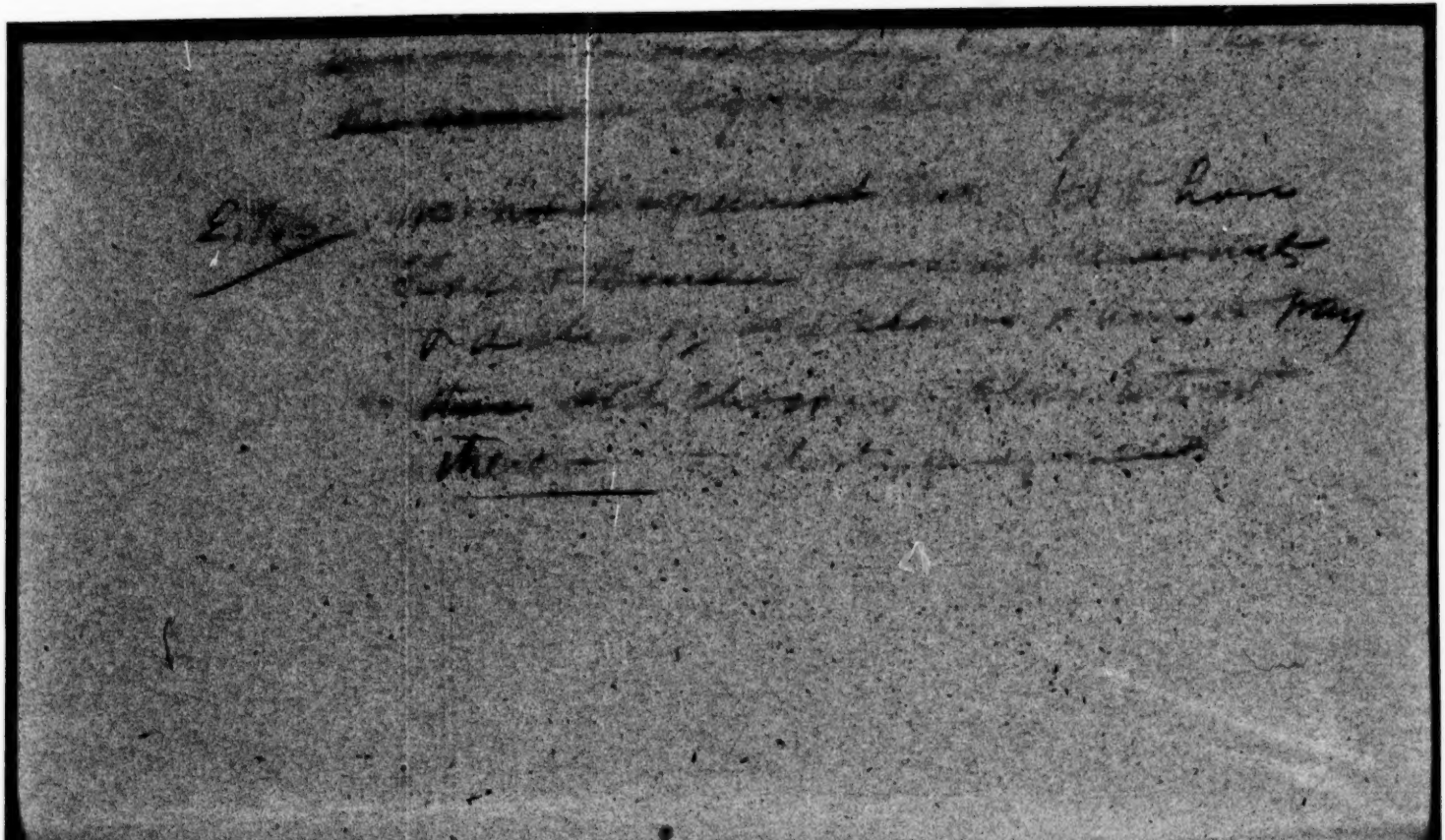
vs.

THE UNITED STATES

APPEAL FROM THE COURT OF CLAIMS.

FILED NOVEMBER 2, 1925

(30,684)



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INDEX

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MARCH 21, 1925

[fol. 1] **IN COURT OF CLAIMS OF THE UNITED STATES**

No. 34449

THE CHEROKEE NATION

vs.

THE UNITED STATES

I. HISTORY OF PROCEEDINGS

On February 5, 1920, the plaintiff filed its original petition.

On November 7, 1921, on motion made therefor and allowed by the court, the defendant filed a plea to the jurisdiction.

On November 7, 1921, the plea to the jurisdiction was argued and submitted by Mr. George T. Stormont, for the defendant, and by Messrs. Frank J. Boudinot and C. C. Calhoun, for the plaintiff. Mr. James T. Lloyd was heard as amicus curiæ.

II. ORDER OVERRULING PLEA TO JURISDICTION—Dec. 12, 1921

It is ordered by the court that the defendant's plea to the jurisdiction be and the same is overruled.

[fol. 2] III. AMENDED PETITION—Filed March 12, 1923, by Leave of Court

To the Honorable the Chief Justice and the Judges of the Court of Claims:

Your petitioner, the Cherokee Nation, by leave of Court first had and obtained, files this, its amended petition, and shows the following case:

Jurisdiction

(1) By the act March 3rd, 1919 (40 Stat. 1316) jurisdiction is conferred upon this court to hear, consider and determine the claim of the Cherokee Nation for interest alleged to be owing by the United States to said Nation on funds adjudicated in the Court of Claims, May 18th, 1905 (40 C. Cl. 252), in addition to all other interest heretofore allowed and paid; and to examine all laws, treaties or agreements affecting the question of interest on said funds and [fol. 3] especially the agreement between the United States and the Cherokee Nation of December 19th, 1891 (27 Stat. L. 640, Sec. 10); and if it should find that under any of said treaties, laws or agree-

m-nts, interest is rightfully owing from the United States to the Cherokee Nation, to render judgment therefor against the United States. The said act of March 3rd, 1919, is as follows:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That jurisdiction is hereby conferred upon the Court of Claims to hear, consider and determine the claim of the Cherokee Nation against the United States for interest, in addition to all other interest heretofore allowed and paid, alleged to be owing from the United States to the Cherokee Nation on the funds arising from the judgment of the Court of Claims of May eighteenth, nineteen hundred and five (Fortieth Court of Claims Report, page two-hundred and fifty-two), in favor of the Cherokee Nation. The said court is authorized, empowered, and directed to carefully examine all laws, treaties, or agreements, and especially the agreement between the United States and the Cherokee Nation of December nineteenth, Eighteen-hundred and ninety-one, ratified by the United States March third, Eighteen-hundred and ninety-three (Twenty-seventh Statutes at Large, page six-hundred and forty, section ten), in any manner affecting or relating to the question of interest on said funds, as the same shall be brought to the attention of the Court by the Cherokee Nation under this Act. And if it shall be found that under any of the said treaties, laws, or agreements interest on one or more of the said funds, either in whole or in part, has not been paid and is rightfully owing from the United States to the Cherokee Nation, the court shall render final judgment therefor against the United States, and [fol. 4] in favor of the Cherokee Nation, either party to have the right to appeal to the Supreme Court of the United States as in other cases. The said claim shall be presented within one year after the passage of this Act by petition in the Court of Claims by the Cherokee Nation as plaintiff against the United States as defendant, and the petition shall be verified by the attorney employed to prosecute said claim by the Cherokee Nation acting through its principal chief. A copy of the petition shall be served upon the Attorney General of the United States, and he, or some attorney from the Department of Justice to be designated by him, is hereby directed to appear and defend the interests of the United States in said cause. The law and practice and rules of procedure in said courts shall be the practice and law in this case.

"The attorney for the Cherokee Nation shall be paid such fee as the Court of Claims may find reasonable, the same to be approved by the Secretary of the Interior: Provided, That in no case shall the fee decreed by said Court of Claims be in excess of the amount stipulated in his contract of employment, nor amount to more than ten per centum of the sum, if any, to which the Cherokee Nation shall be found entitled. The amount recovered, if any, for the Cherokee Nation shall be disbursed under the supervision of the Secretary of the Interior to the parties entitled thereto in the manner prescribed by the Court of Claims.

"Approved, March 3, 1919."

Facts

(2) Under the Act of March 2, 1889 (25 Stat. 1005), the President appointed commissioners to negotiate with the Cherokee Indians for the cession of their lands West of the 96 degree of West longitude, commonly known as the Cherokee Outlet, containing 8,144,-[fol. 5] 682.91 acres of land. At the outset of the negotiations the Cherokee Nation renewed its claims for balances alleged to be due under various treaties between the United States and said Cherokee Nation and demanded "as a condition precedent to any agreement for the sale of the land" that some adjustment of these claims be made.

(3) On December 19, 1891, after prolonged negotiations an agreement was entered into between the commissioners representing the United States and the commissioners representing the Indians, wherein the Cherokee Nation agreed to cede the said, 8,144,682.91 acres of land and the United States on their part agreed as follows:

Art. II. For and in consideration of the above cession and relinquishment the United States agrees: * * * "Fourth. The United States shall, without delay, render to the Cherokee Nation, through any agent appointed by authority of the national council, a complete account of moneys due the Cherokee Nation under any of the treaties ratified in the years 1817, 1819, 1825, 1828, 1833, 1835, 1836, 1846, 1866 and 1868, and any laws passed by Congress of the United States for the purpose of carrying said treaties, or any of them into effect; and upon such accounting should the Cherokee Nation, by its national council, conclude and determine that such accounting is incorrect or unjust, then the Cherokee Nation shall have the right within twelve (12) months to enter suit against the United States in the Court of Claims, with the right of appeal to the Supreme Court of the United States by either party, for any alleged or declared amount of money promised but withheld by the United States from the Cherokee Nation, under any of said treaties or laws, which may be claimed [fol. 6] to be omitted from or improperly or unjustly or illegally adjusted in said accounting; and the Congress of the United States shall at its next session, after such case shall be finally decided and certified to Congress according to law, appropriate a sufficient sum of money to pay such judgment to the Cherokee Nation, should judgment be rendered in her favor; or, if it shall be found upon such accounting that any sum of money has been so withheld, the amount shall be duly appropriated by Congress, payable to the Cherokee Nation upon the order of its national council, such appropriation to be made by Congress if then in session, and if not, then at the session immediately following such accounting.

* * * * * * *

Sixth. That in addition to the foregoing enumerated consideration for the cession and relinquishment of title to the lands herein before provided the United States shall pay to the Cherokee Nation, at such time and in such manner as the Cherokee national council shall determine, the sum of eight-million, five-hundred and ninety-five

thousand, seven-hundred and thirty-six and twelve one-hundredth ($8,595,736.12) Dollars in excess of the sum of seven-hundred and twenty-eight thousand, three-hundred and eighty-nine and forty-six one-hundredth ($726,389.46) Dollars, the aggregate of amounts heretofore appropriated by Congress and charged against the lands of the Cherokees west of the Arkansas River, and also in excess of the amount heretofore paid by the Osage Indians for their reservation. So long as the money or any part of it shall remain in the Treasury of the United States after this agreement shall have become effective, such sum so left in the Treasury of the United States shall bear interest at the rate of five per centum per annum, payable semi-annually: Provided, That the United States may at any time pay to said Cherokee Nation the whole or any part of said sum and thereupon [fol. 6½] terminate the obligation of the United States in respect to so much thereof as shall be so paid and in respect to any further interest upon the same: Provided further, That should the Cherokee Nation determine to distribute said money, or any part thereof, principal or interest, to any of its citizens, per capita, and should the classes of persons provided for in the ninth and fifteenth articles of the treaty of July 19, 1866, claim that in such distribution they have been unjustly or illegally discriminated against, then on complaint made by such persons Congress shall by law authorize a suit in a proper court by and between such classes of persons and the United States and the Cherokee Nation to determine that question, giving to any party thereto the right of appeal to the Supreme Court of the United States, and providing that such suit or suits may in proper manner be advanced upon the dockets of such courts to secure a speedy hearing of the same, and the United States shall retain a sufficient sum of such money under its control to adjust and relieve such discrimination, should it be adjudged that such discrimination has been made. It is expressly understood that this agreement, ceding and relinquishing the title to the lands herein described, shall not be effective for any purpose whatever until it shall in its entirety be ratified by Congress and the amount of money herein agreed to be paid to the Cherokee Nation for such cession and relinquishment shall have been appropriated by Congress, and placed in the Treasury of the United States subject to the order of the Cherokee national council: Provided further, That nothing contained in this agreement shall have the effect to limit or impair any rights whatever the Cherokee Nation has in or to over the land herein ceded until it shall be so ratified by Congress: And provided further, That if this agreement shall not be ratified by Congress, and the appropriation of money, as herein provided for, made on or before March 4, 1893, it shall be [fol. 7] utterly void." (Sen. Ex. Doc. 56, 52nd Cong. 1st Sess. p. 18-19.)

(4) Prior to the acceptance and ratification of the agreement on the part of the United States as finally consummated the commissioners in behalf of the United States reported to the President the making of the articles of agreement and by way of explanation said (202 U. S. 101, 108):

"As to the conditions of the agreement, besides the relinquishment of title upon the one part and the payment of a price in money on the other, it is necessary to state that the settlement of the matters contained in such conditions were made a condition precedent to any agreement for the sale of the land." (Sen. Ex. Doc. 56, 52nd Cong. 1st Sess., p. 11.)

(5) On January 4th, 1892, this agreement was duly accepted and approved by the Cherokee council and on March 3rd, 1893, was, with certain amendments not necessary to be considered here, ratified and approved by Congress (27 Stat. 612, 640-643, Sec. 10); thereafter, to-wit, on March 17, 1893, a deed of cession was made and delivered by the duly constituted authorities of the Cherokee Nation to the United States and the first installment of the purchase price was paid to and accepted by the Cherokee Nation, which, under the said Act of March 3, 1893, operated as "a full and complete cession and relinquishment of all their title and interests in and to said lands."

(6) Under the provisions of the agreement as ratified by Congress and as construed by this Court and the Supreme Court as hereinafter shown, and as part of the consideration for said lands, the United [fol. 8] States was required to render to the Cherokee Nation a complete account of all money agreed to be paid to the Indians under any treaties and acts of Congress since 1817, and if such accounting by the Government was satisfactory to the Cherokee Nation, Congress should make the necessary appropriation therefor; and if not satisfactory, the Indians should have the right to institute suit in this court for the claimed amounts. In accordance with this provision and the terms of said act of March 3, 1893, appropriating $5,000.00 for the purpose, an accounting was made by the Government accountants, Slade and Bender, whose findings filed April 28, 1894, were approved by the Cherokee Nation and thereafter, on January 7th, 1895, were transmitted by the Secretary of the Interior to Congress then in session. This account stated the amounts due the Cherokees as follows:

"Item 1. The sum of.....	$2,125.00
With interest thereon at the rate of 5 per cent from February 27, 1819, to date of payment.	
"Item 2. The sum of.....	$1,111,284.70
With interest thereon at the rate of 5 per cent from June 12, 1838, to date of payment.	
"Item 3. The sum of.....	$432.28
With interest thereon at the rate of 5 per cent from January 1, 1874, to day of payment.	
"Item 4. The sum of.....	$20,406.25
With interest thereon from July 1, 1893, to date of payment."	

(7) Although the aforesaid agreement of December 19, 1891, as ratified and approved by Congress, required that

"If it shall be found upon such accounting that any sum of money has been so withheld, the amount shall be duly appropriated by Con-

[fol. 9] gress, payable to the Cherokee Nation, upon the order of its national council, such appropriation to be made by Congress if then in session, and if not, then at the session immediately following such accounting."

and although the Government accounting had been as aforesaid duly accepted by the Cherokee Nation and reported to Congress, nevertheless Congress adjourned March 4th, 1895, without making any appropriation to pay the Cherokee Nation the sums of money then due as "the payment of the price in money" for the "full and complete cession and relinquishment of all their title" on the part of the Indians, the obligation to pay which promptly "no agreement could have made more unequivocal and specific."

(8) The petitioner, therefore, shows that, at the adjournment of the session of Congress to which the Slade and Bender award had been reported, to-wit: March 4, 1895, the full purchase money for the land ceded by the Cherokee Nation to the United States was due and payable to said Indians as a principal obligation and liquidated debt of the United States. Said accounting in fact merely provided an arithmetical means of ascertaining the exact amount of the purchase price of the land then due and payable.

The amounts found due under the Slade and Bender award, and payable March 4, 1895, were as follows:

[fol. 10]

Item 1. Under the treaty of 1819...	$2,125.00	
Interest from February 27, 1819, to March 4, 1895..	8,076.45	
		$10,201.45
Item 2. Under the treaty of 1835..	1,111,284.70	
Interest from June 12, 1838, to March 4, 1895.....	3,151,938.31	
		4,263,223.01
Item 3. Under the treaty of 1866..	432.28	
Interest from January 1, 1874, to March 4, 1895..	457.62	
		889.90
Item 4. Under Act of Congress of 1893	20,406.25	
Interest from July 1, 1893, to March 4, 1895.....	1,710.75	
		22,117.00
		$4,296,431.36

(9) Congress having failed as aforesaid to make any appropriation at the session which ended March 4, 1895, for the payment of the sums then due and as aforesaid owing from the United States to

these Indians, it became, and was necessary, for the Cherokee Nation to enter again upon prolonged negotiations with various officials of the Government and with Congress, which negotiations, after the lapse of several years, resulted in the passage by Congress of the Act of July 1, 1902, conferring jurisdiction upon this court, with the right to appeal to the Supreme Court, to consider and adjudicate "any claim which the Cherokee Tribe, or any band thereof, arising under treaty stipulations, may have against the United States" (32 Stat. 726). Said Act of July 1, 1902, is as follows:

"Jurisdiction is hereby conferred upon the Court of Claims to examine, consider, and adjudicate, with a right of appeal to the Supreme Court of the United States by any party in interest feeling aggrieved at the decision of the Court of Claims, any claim which the Cherokee tribe, or any band thereof, arising under treaty stipulations, may have against the United States, upon which suit [fol. 11] shall be instituted within two years after the approval of this act; and also to examine, consider and adjudicate any claim which the United States may have against said tribe, or any band thereof. The institution, prosecution or defense, as the case may be, on the part of the tribe, or any band, of any such suit, shall be through attorneys employed and to be compensated in the manner prescribed in sections twenty-one hundred and three to twenty-one hundred and six, both inclusive of the Revised Statutes of the United States, the tribe acting through its principal chief in the employment of such attorneys, and the band acting through a committee recognized by the Secretary of the Interior. The Court of Claims shall have full authority, by proper orders and process, to make parties to any such suit all persons whose presence in the litigation it may deem necessary or proper to the final determination of the matter in controversy, and any such suit shall, on motion of either party, be advanced on the docket of either of said courts and be determined at the earliest practicable time."

(10) A supplemental act was passed March 3, 1903 (32 Stat. 996), giving to the Eastern Cherokees the status of a band for the purposes of instituting suit, and under these jurisdictional acts three suits were instituted, consolidated and afterwards prosecuted to final judgment in this court (40 C. Cl. 252) and in the Supreme Court (202 U. S. 101) on the claims of the petitioner "arising under treaty stipulations." In this suit this court gave judgment for the amount ascertained by the Government accounting in 1894 to be due under said "treaty stipulations" and in the very terms and language of the findings of Slade and Bender, fixing the liability of the United States for interest, as well as principal, as found due by the Government accountants; and the decree therein of May 18, 1905, was [fol. 12] that "the Cherokee Nation do have and recover from the United States" the four several items heretofore set out in the Slade and Bender account, with interest as therein specified on each item.

Claim Asserted Herein

(11) Under this decree and the opinion of the court holding that the said several sums and interest, as last above set out, were a liquidated debt of the United States as the purchase price of the Cherokee Outlet, the obligation to pay which became fixed and certain March 4, 1895, this petitioner asserted before the executive departments the right to receive, from the said "effective" date of the agreement, to-wit, March 4, 1895, interest on the whole of this purchase money which then aggregated $4,296,431.96. The accounting officers of the United States refused to so construe the said decree, opinion and agreement, and refused to pay the petitioner's claim for interest on the whole of the purchase price from March 4, 1895, although by the said act of June 30, 1905 (34 Stat. L. 64) Congress in addition to appropriating specific sums to pay the several items of the judgment and interest on each item, appropriated "such additional sum as may be necessary to pay interest as authorized by law."

(12) The officers of the United States having refused to pay the whole of the interest due under said agreement, the petitioner memoralized Congress for a jurisdictional act which would authorize this court to consider and adjudicate the petitioner's right under said agreement to interest on the whole of the purchase price of the Cherokee Outlet from the said "effective" date of said agreement, to-wit, March 4, 1895, and in rsponse to the petitioner's memorial and [fol. 13] efforts, Congress passed the said act of March 3, 1919, under which this petition is filed. Such interest is "rightfully owing" from the United States to this petitioner under the provisions of the sixth paragraph of said agreement, as ratified and accepted by the said act of March 3, 1893 (27 Stat. 640) the pertinent part of which is as follows:

"So long as the money, or any part of it, shall remain in the Treasury of the United States after this agreement shall have become effective, such sum so left in the Treasury of the United States shall bear interest at the rate of 5 per cent per annum, payable semi-annually. Provided, That the United States may at any time pay to said Cherokee Nation the whole or any part of said sum, and thereupon terminate the obligation of the United States in respect to so much thereof as shall be so paid, and in respect to any further interest upon the same."

(13) Not only is interest on this purchase price due the petitioner under the specific agreement of Dec. 19, 1891, and the act of March 3, 1893, ratifying it, but the United States is trustee for the Cherokee Indians for any balance in the Treasury due under the said agreement and act of Congress, and as such trustee, under the act of September 11, 1841 (5 Stat. 465) is liable for interest on this trust fund at 5 per cent per annum. The provision of said act is as follows:

"All funds held in trust by the United States, and the annual interest accruing thereon, when not otherwise required by treaty, shall be invested in stocks of the United States, bearing a rate of interest not less than five per centum per annum." (5 Stat. 465).

[fol. 14] To enable this court to give judgment for any interest rightfully owing to petitioner under said agreement and said acts of Congress, this petitioner shows the following payments on the principal and interest as the purchase price of the Cherokee Outlet, since the decree of this court May 18, 1905:

On July 2, 1906, to the Secretary of the Interior on account of said Item 1	$11,520.46
On the same date on account of Item 3	1,140.49
On the same date on account of Item 4	23,294.92
On July 14, 1906, to the attorneys for the Eastern Cherokees and the Eastern and Emigrant Cherokees, fees amounting to	740,555.42
On November 3, 1906, to the attorneys for the Cherokee Nation on account of Item 2, fees amounting to	148,245.15
On various dates after July 2, 1906, and before final distribution of the fund arising from Item 2, to Guion Miller for fees and expenses the sum of	103,749.74
On and after March 15, 1910, to Guion Miller for per capita distribution among the Cherokees entitled to share in the fund the sum of	4,105,810.77
On or about August 7, 1919, additional interest on Item 4, pursuant to the Act of June 30, 1919	21,502.46
On or about August 7, 1919, to the Secretary of the Interior as additional interest on Item 1, pursuant to the said Act of une 30, 1919	2,185.72
Making a total sum, principals and interest, of	$5,158,005.13

(15) The correct statement of the account between the United States and the petitioner as of March 15, 1910, is as follows:

March 4, 1895, part purchase price of land (Principal and interest under treaty stipulations then due)		$4,296,431.35
Interest to March 15, 1910, at 5%		3,215,477.95
		$7,511,909.30
Credits:		
July 2, 1906	$11,520.46	
July 2, 1906	1,140.49	
July 2, 1906	23,294.92	
July 14, 1906	740,555.42	
November 3, 1906	148,245.15	
July 2, 1906	103,749.74	
March 15, 1910	4,105,810.77	
		$5,134,316.95

[fol. 15] On this balance of $2,377,592.35 the petitioner is entitled to interest at 5 per cent from March 15, 1910, until paid, the defendant at final payment to be credited with the interest payments made August 7, 1919, aggregating $23,688.18; and for this balance this petitioner prays judgment.

(16) Finally, the petitioner shows that Congress by said Act of June 30, 1906 (34 Stat. 664) appropriated a sum sufficient to pay the several items of said judgment of this court, "together with such additional sum as may be necessary to pay interest as authorized by law," and thereby agreed to provide for the payment of all interest due under the provisions of said agreement of December 19, 1891, and said Act of Congress of March 3, 1893. However, in making the aforesaid payments to petitioner the United States failed and refused to take into consideration, or to give any force or effect to said agreement, or said Act of Congress of March 3, 1893, ratifying same.

Prayer

Wherefore, the petitioner prays judgment for the sum of $2,377,592.35, with interest thereon at 5 per cent per annum from March 15, 1910, until paid, the United States at final payment to be credited by the interest payments of August 7, 1919, aggregating $23,688.18; and for such additional and other sums as may be necessary to pay for further, or any other, interest authorized by law; and that the judgment herein awarded arising out of the funds designted as Item 2, of the Slade and Bender award, shall be paid directly to the Eastern and Western Cherokees who were parties either to the Treaty of New Echota, as proclaimed May 23, 1836, [fol. 16] or the Treaty of Washington, August 6, 1846, as individuals, whether east or west of the Mississippi River, or to the legal representatives of said individuals, and exclusive of the Old Settlers.

Frank J. Boudinot, Attorney of Record. C. C. Calhoun, Wilfred Hearn, Frank K. Nebeker, Leslie C. Garnett, Fred G. Coldren, B. A. McGinn, of Counsel.

District of Columbia, ss:

On this 8th day of March, 1923, before me, a Notary Public, within and for the District of Columbia, personally appeared Frank J. Boudinot, personally known, who being first duly sworn, deposes and says that he has read the foregoing petition, and that the allegations therein contained are true to the best of his knowledge and belief; and further deposing, says that he is the attorney mentioned and referred to in the Act of March 3, 1919 (40 Stat. 1316), as the attorney employed by the Principal Chief of the Cherokee Nation, to prosecute the claim of the nation against the United States as set forth in the foregoing petition.

Subscribed and sworn to before me the day and year above written.
Francis L. Neubeck, Notary Public. My commission expires August 24, 1926.

[fol. 17] IV. General Traverse

No demurrer, plea, answer, counterclaim, set-off, claim of damages, demand, or defense in the premises, having been entered on the part of the defendant, a general traverse is entered as provided by Rule 34.

V. Argument and Submission

On April 1, 1924, this case was argued and submitted on merits by Messrs. F. K. Nebeker, Frank J. Boudinot and L. C. Garnett, for the plaintiff, and by Mr. George T. Stormont, for the defendant.

[fol. 18] **VI. Findings of Fact, Conclusion of Law, and Memorandum by the Court**—June 23, 1924

This case having been heard by the Court of Claims, the court upon the evidence makes the following

Findings of Fact

I

In pursuance of the act of March 3, 1919, 40 Stat. 1316, entitled "An act conferring jurisdiction upon the Court of Claims to hear, consider, and determine certain claims of the Cherokee Nation against the United States," the plaintiff, on February 5, 1920, filed a petition in said court, and on March 12, 1923, filed an amended petition therein. The said act reads:

"That jurisdiction is hereby conferred upon the Court of Claims to hear, consider, and determine the claim of the Cherokee Nation against the United States for interest, in addition to all other interest heretofore allowed and paid, alleged to be owing from the United States to the Cherokee Nation on the funds arising from the judgment of the Court of Claims of May eighteenth, nineteen hundred and five (Fortieth Court of Claims Reports, page two hundred and fifty-two) in favor of the Cherokee Nation. The said court is authorized, empowered, and directed to carefully examine all laws, treaties, or agreements, and especially the agreement between the United States and the Cherokee Nation of December nineteenth, eighteen hundred and ninety-one, ratified by the United States March third, eighteen hundred and ninety-three (Twenty-seventh Statutes at Large, page six hundred and forty, section ten), in any manner affecting or relating to the question of interest on said funds, as the same shall be brought to the attention of the court by the Cherokee Nation under this act. And if it shall be found that under any of the said treaties, laws, or agreements interest on one or more of the

said funds, either in whole or in part, has not been paid and is rightfully owing from the United States to the Cherokee Nation, the court shall render final judgment therefor against the United States and in favor of the Cherokee Nation, either party to have the right to [fol. 19] appeal to the Supreme Court of the United States as in other cases. The said claim shall be presented within one year after the passage of this act by petition in the Court of Claims by the Cherokee Nation as plaintiff against the United States as defendant, and the petition shall be verified by the attorney employed to prosecute said claim by the Cherokee Nation acting through its principal chief. A copy of the petition shall be served upon the Attorney General of the United States, and he, or some attorney from the Department of Justice to be designated by him, is hereby directed to appear and defend the interests of the United States in said cause. The law and practice and rules of procedure in said courts shal be the practice and law in this case.

"The attorney for the Cherokee Nation shall be paid such fee as the Court of Claims may find reasonable, the same to be approved by the Secretary of the Interior: Provided, That in no case shall the fee decreed by said Court of Claims be in excess of the amount stipulated in his contract of employment, nor amount to more than ten per centum of the sum, if any, to which the Cherokee Nation shall be found entitled. The amount recovered, if any, for the Cherokee Nation shall be disbursed under the supervision of the Secretary of the Interior to the parties entitled thereto in the manner prescribed by the Court of Claims."

II

The right to bring this suit is claimed under the following contract entered into between W. C. Rogers, principal chief of the Cherokee Nation, and Frank J. Boudinot, attorney at law:

"Know all men by these presents, That this contract, made and entered into this the 20th day of November, 1916, is made by and between the Cherokee Nation, acting through its principal chief, W. C. Rogers, whose occupation is that of principal chief of the Cherokee Nation, and whose residence is in the town of Skiatook, in the State of Oklahoma, party of the first part, and Frank J. Boudinot, whose occupation is that of attorney at law, and whose residence is in the town of Fort Gibson, in the State of Oklahoma, party of the second part.

"The purpose for which this contract is made is to secure the services of the party of the second part as attorney and counselor at law for the Cherokee Nation. The special thing to be done under this contract by the party of the second part is to represent said nation as attorney before the authorities of the United States Government (the committees of Congress, the executive departments, and the courts) in the matter hereinafter mentioned; that is to say, in the prosecution of the claim of the Cherokee Nation against the United States which grew out of the agreement between the Cherokee

Nation and the United States for the purchase of what is known as th Cherokee Outlet, the judgment of the Court of Claims of May 18, 1905, on said agreement and acts of Congress, laws of the United States applicable thereto.

"This contract is to run from the 20th day of November, 1916, until the 4th day of March, 1920: Provided, however, That if the questions and matters involved shall be then pending in the courts or other tribunal for final determination, then and in that event this [fol. 20] contract shall be and remain in full force and effect until final determination of the same.

"The rate per centum of fee to be paid to party of the second part in full for his services under this contract shall be fifteen per centum upon the amount collected, the disposition to be made of the money when collected under this contract shall be as provided by existing law or as may be hereafter directed by Congress or by the court having jurisdiction of same, except the fee above provided; the compensation aforesaid to be paid to the said party of the second part by the proper officers of the United States shall be deducted from the amount recovered, and by the said officers paid direct to the said party of the second part.

"No contingent matter or condition, except as herein set forth, constitutes any part of this contract; and by virtue of and under the authority of said Cherokee Nation, acting through its principal chief, W. C. Rogers, the party of the first part has employed, and by these presents doth employ, the party of the second part, to represent said Cherokee Nation before the authorities of the United States Government (the committee of Congress, the executive departments, and the courts) in the city of Washington, District of Columbia, as attorney of said nation in the prosecution to a final determination and payment of the said claim, for and during the time aforesaid and for the compensation aforesaid, hereby giving to said attorney full power and authority in the premises to do and perform all things whatsoever that may be necessary and lawful in the prosecution of the said claim and for the securing payment thereof by the United States; to sign and execute all papers that may be required on behalf of said nation, hereby ratifying and confirming all the lawful acts of said attorney done in pursuance of the authority of this contract.

"The party of the second part hereby accepts the employment herein set forth and provided for upon the terms and conditions specified, and he will, to the best of his ability, do and perform the services stipulated and required by this contract.

"Witness our hands and seals this the 20th day of November, 1916, and executed in triplicate."

On the same day, November 20, 1916, the above contract was duly executed by the parties thereto before Conn Linn, judge of the district court of Tulsa County, Oklahoma.

W. C. Rogers died on October 1, 1917, and the President filled the vacancy caused by his death on November 8, 1919, by the appointment of Andrew B. Cunningham as principal chief for a term expiring on November 25, 1919. Since then the office has remained

vacant. The contract between W. C. Rogers and Frank J. Boudinot was not approved by the President.

III

By section 14 of the act of March 2, 1889 (25 Stat. 1005), the President was authorized to appoint three commissioners to negotiate with the Indian tribes owning or claiming lands west of the 96th degree of west longitude in the Indian Territory for the cession of all their title, claim, or interest of every kind and character in and to said land to the United States. The President under said act [fol. 21] appointed three such commissioners. The Cherokee Nation, by virtue of the act of the national council of November 16, 1891, appointed seven commissioners to negotiate with the three commissioners appointed by the President "for the cession of the lands of the Cherokee Nation west of the ninety-sixth degree of west longitude and for the final adjustment of all questions of interest between the United States and the Cherokee Nation which are now unsettled." It was the duty of the commission appointed by the President to report to him the result of their negotiations for transmittal to Congress and of the commission appointed by the Cherokee Nation to report their proceedings in full for its approval and ratification to the Cherokee national council.

On December 19, 1891, the said commissioners entered into an agreement by article 1 of which the Cherokee Nation agreed to cede 8,144,682.91 acres, between the 96th and 100th degrees of west longitude, south of the Kansas line commonly known as the "Cherokee outlet." The pertinent parts of said agreement read:

"Article II. For and in consideration of the above cession and relinquishment the United States agrees:

* * * * * * *

"'Fourth. The United States shall, without delay, render to the Cherokee Nation, through any agent appointed by authority of the national council, a complete account of moneys due the Cherokee Nation under any of the treaties ratified in the years 1817, 1819, 1825, 1828, 1833, 1835, 1836, 1846, 1866, and 1868, and any laws passed by Congress of the United States for the purpose of carrying said treaties, or any of them, into effect; and upon such accounting should the Cherokee Nation, by its national council, conclude and determine that such accounting is incorrect or unjust, then the Cherokee Nation shall have the right within twelve (12) months to enter suit against the United States in the Court of Claims, with the right of appeal to the Supreme Court of the United States by either party, for any alleged or declared amount of money promised but withheld by the United States from the Cherokee Nation, under any of said treaties or laws, which may be claimed to be omitted from or improperly or unjustly or illegally adjusted in said accounting; and the Congress of the United States shall at its next session, after such case shall be finally decided and certified to Congress according to law,

appropriate a sufficient sum of money to pay such judgment to the Cherokee Nation, should judgment be rendered in her favor; or, if it shall be found upon such accounting that any sum of money has been so withheld, the amount shall be duly appropriated by Congress, payable to the Cherokee Nation upon the order of its national council, such appropriation to be made by Congress if then in session, and if not, then at the session immediately following such accounting.

* * * * * * *

"'Sixth. That in addition to the foregoing enumerated considerations for the cession and relinquishment of title to the lands hereinbefore provided the United States shall pay to the Cherokee Nation, at such time and in such manner as the Cherokee National Council shall determine, the sum of eight million five hundred and ninety-five thousand seven hundred and thirty-six and twelve one-hundredths ($8,595,736.12) dollars in excess of the sum of seven hundred [fol. 22] and twenty-eight thousand three hundred and eighty-nine and forty-six one-hundredths ($728,389.46) dollars, the aggregate of amounts heretofore appropriated by Congress and charged against the lands of the Cherokees west of the Arkansas River, and also in excess of the amount heretofore paid by the Osage Indians for their reservation. So long as the money or any part of it shall remain in the Treasury of the United States after this agreement shall have become effective, such sum so left in the Treasury of the United States shall bear interest at the rate of five per centum per annum, payable semi-annually: Provided, That the United States may at any time pay to said Cherokee Nation the whole or any part of said sum and thereupon terminate the obligation of the United States in respect to so much thereof as shall be so paid and in respect to any further interest upon the same: Provided further, That should the Cherokee Nation determine to distribute said money or any part thereof, principal or interest, to any of its citizens, per capita, and should the classes of persons provided for in the ninth and fifteenth articles of the treaty of July 19, 1866, claim that in such distribution they have been unjustly or illegally discriminated against, then on complaint made by such persons Congress shall by law authorize a suit in the proper court by and between such classes of persons and the United States and the Cherokee Nation, to determine that question, giving to any party thereto the right of appeal to the Supreme Court of the United States, and providing that such suit or suits may in proper manner be advanced upon the dockets of such court to secure a speedy hearing of the same; and the United States shall retain a sufficient sum of such money under its control to adjust and relieve such discrimination, should it be adjudged that such discrimination has been made. It is expressly understood that this agreement, ceding and relinquishing the title to the lands herein described, shall not be effective for any purpose whatever until it shall in its entirety be ratified by Congress and the amount of money herein agreed to be paid to the Cherokee Nation for such cession and relinquishment shall have been appropriated by Congress and placed in the Treasury of the United

States subject to the order of the Cherokee National Council: Provided further, That nothing contained in this agreement shall have the effect to limit or impair any rights whatever the Cherokee Nation has in or to or over the lands herein ceded until it shall be so ratified by Congress: And provided further, That if this agreement shall not be ratified by Congress, and the appropriation of money, as herein provided for, made on or before March 4, 1893, it shall be utterly void.'"

On January 4, 1892, the agreement of 1891 was approved by the Cherokee National Council. The said agreement was ratified by Congress by section 10 of the act of March 3, 1893 (27 Stat. 612, 640), which appropriated of the cash consideration for the cession of the Cherokee Outlet, $8,595,736.12, set out in paragraph six of Article 2 of the agreement of December 19, 1891, the sum of $295,736 to be "immediately available and the remaining sum of eight million three hundred thousand dollars or so much thereof as is required to carry out the provisions of said agreement as amended, and according to this act to be payable in five equal installments, commencing on the fourth day of March, eighteen hun- [fol. 23] dred and ninety-five, and ending on the fourth day of March, eighteen hundred and ninety-nine, said deferred payments to bear interest at the rate of four per centum per annum, to be paid annually, and the amount required for the payment of interest as aforesaid is hereby appropriated."

The said act further provides:

"And the provisions of said agreements so amended shall be fully performed and carried out on the part of the United States. * * * The acceptance by the Cherokee Nation of Indians of any of the money appropriated as herein set forth shall be considered and taken and shall operate as a ratification by said Cherokee Nation of Indians of said agreement as it is hereby proposed to be amended, and as a full and complete relinquishment, and extinguishment of all their title, claim, and interest in and to said lands. * * *

"The sum of $5,000, or so much thereof as may be necessary, the same to be immediately available, is hereby appropriated, out of any money in the Treasury not otherwise appropriated, to enable the Commissioner of Indian Affairs, under the direction of the Secretary of the Interior, to employ such expert person or persons to properly render a complete account to the Cherokee Nation of moneys due said Nation, as required in the fourth subdivision of Article II of said agreement."

On May 17, 1893, a deed of cession was executed and delivered by the proper authorities of the Cherokee Nation to the United States and the first installment of the purchase money was paid to and accepted by the Cherokee Nation and the United States thereupon took possession of said lands, and thereafter disposed of the same as public lands.

In pursuance of the last paragraph of section 10 of the act of March 3, 1893 (27 Stat. 643), the Secretary of the Interior promptly employed two expert accountants, Messrs. James A. Slade and Joseph T. Bender, to prepare an account between the United States and the Cherokee Nation, and on April 28, 1894, the said experts filed their account with the Secretary of the Interior, which reads as follows:

Under the treaty of 1819:

Value of three tracts of land containing 1,700 acres, at $1.25 per acre, to be added to the principal of the "school" fund.....	$2,125.00
(With interest from Feb. 27, 1819, to date of payment.)	

Under treaty of 1835:

Amount paid for removal of Eastern Cherokees to the Indian Territory, improperly charged to treaty fund.....	1,111,284.70
(With interest from June 12, 1838, to date of payment.)	

Under treaty of 1866:

Amount received by receiver of public moneys at Independence, Kans., never credited to Cherokee Nation	432.28
(With interest from Jan. 1, 1874, to date of payment.)	

Under act of Congress, March 3, 1893:

Interest on $15,000 of Choctaw funds applied in 1863 to relief of indigent Cherokees, said interest being improperly charged to Cherokee national fund	20,406.25
(With interest from July 1, 1893, to date of restoration of the principal of the Cherokee funds, held in trust in lieu of investments.)	

[fol. 24] The said account was transmitted by the Secretary of the Interior to the proper authorities of the Cherokee Nation and it was accepted by act of the National Council approved December 1, 1894. The account was transmitted by the Secretary to Congress on January 7, 1895. Congress, then in session, failed to make an appropriation to pay the amounts found due by said accountants, and adjourned sine die on March 4, 1895. The principal due on said account on March 4, 1895, was $1,134,248.23 and the interest was $3,162,279.34, and the principal and interest amounted to $4,296,527.57.

No action was taken by Congress for the settlement of the amounts due the Cherokee Nation under the Slade and Bender account until July 1, 1902.

IV

Congress, by section 68 of the act of July 1, 1902 (32 Stat. 726), referred the claim arising out of the Slade and Bender award to the Court of Claims, as follows:

"Jurisdiction is hereby conferred upon the Court of Claims to examine, consider, and adjudicate, with the right of appeal to the Supreme Court of the United States by any party in interest feeling aggrieved at the decision of the Court of Claims, any claim which the Cherokee Tribe, or any band thereof, arising under treaty stipulations, may have against the United States, upon which suit shall be instituted within two years after the approval of this act; and also to examine, consider, and adjudicate any claim which the United States may have against the said tribe, or any band thereof * * *."

The act of March 3, 1903 (32 Stat. 996), amended section 68 as follows:

"Section sixty-eight * * * shall be so construed as to give the Eastern Cherokees, so-called, including those in the Cherokee Nation and those who remained east of the Mississippi River, acting together as two bodies, as they may be advised, the status of a band or bands, as the case may be, for all purposes: * * * and said section shall be further so construed as to require that both the Cherokee Nation and said Eastern Cherokees, so called, shall be made parties to any suit which may be instituted against the United States under said section upon the claim mentioned in House of Representatives Executive Document Numbered Three hundred and nine of the second session of the Fifty-seventh Congress; and if said claim shall be sustained in whole or in part the Court of Claims, subject to the right of appeal named in said section, shall be authorized to render a judgment in favor of the rightful claimant, etc."

V

Under the act of July 1, 1902, the Cherokee Nation brought suit against the United States, claiming the whole amount with interest found due by the Slade and Bender account. Thereafter the Eastern Cherokees and the Eastern and Emigrant Cherokees each brought suit under the act of July 1, 1902, as amended by the act of March 3, 1903, against the United States, each claiming the fund of $1,111,284.70 used for the removal of the Eastern Cherokees to the Indian Territory with interest, and improperly charged by the Government [fol. 25] against the treaty fund provided by the treaty of December 29, 1835, known as the "Treaty of New Echota." The three suits were consolidated by order of the court and were heard, considered, and decided together. The decree of the Court of Claims, in

conformity with its opinion and conclusion of law entered March 20, 1905, was in part as follows:

"It is, this 18th day of May, A. D. 1905, adjudged, ordered, and decreed that the plaintiff, the Cherokee Nation, do have and recover of and from the United States as follows:

Item 1: The sum of	$2,125.00
With interest thereon at the rate of 5 per cent from Feb. 27, 1819, to date of payment.	
Item 2: The sum of	1,111,284.70
With interest thereon at the rate of 5 per cent from June 12, 1838, to date of payment.	
Item 3: The sum of	432.28
With interest thereon at the rate of 5 per cent from Jan. 1, 1874, to date of payment.	
Item 4: The sum of	20,406.25
With interest thereon from July 1, 1903, to date of payment.	

Then followed directions as to the payment and distribution of the different items of the judgment. (40 C. Cls. 252, 363, 364.)

VI

The case having gone up to the Supreme Court on appeal, the judgment was affirmed on April 30, 1906, with a modification, consisting of a direction that item two, $1,111,284.70 with interest at 5 per cent from June 12, 1838, to date of payment, should be distributed among "the Eastern Cherokees as individuals, whether east or west of the Mississippi, parties to the treaties of 1835-36 and 1846, and exclusive of Old Settlers." (202 U. S. 101, 130, 131.) On May 28, 1906, the Court of Claims entered a decree modifying its original decree to conform to the mandate of the Supreme Court and fixing the compensation of the attorneys representing the parties plaintiff.

VII

By the act of June 30, 1906 (34 Stat. 634, 664), Congress made appropriation for payment of the judgment of the Court of Claims, principal and interest, as follows:

"To pay the judgment rendered by the Court of Claims on May eighteenth, nineteen hundred and five, in consolidated causes numbered twenty-three thousand one hundred and ninety-nine, The Cherokee Nation versus The United States; numbered twenty-three thousand two hundred and fourteen, The Eastern Cherokees versus The United States; and numbered twenty-three thousand two hundred and twelve, The Eastern and Emigrant Cherokees versus The United States, aggregating a principal sum of one million one hundred and thirty-four thousand two hundred and forty-eight dollars and twenty-three cents, as therein set forth, with interest upon the

several items of judgment at five per centum, one million one hundred and thirty-four thousand two hundred and forty-eight dollars and twenty-three cents, together with such additional sum as may be necessary to pay interest, as authorized by law."

[fol. 26] The act of June 30, 1906, supra, was amended by the act of March 4, 1909 (35 Stat. 907, 938, 939), as follows:

"That the general deficiency appropriation act of June thirtieth, nineteen hundred and six, so far as the same provides for the payment of item 2 of the judgment of the Court of Claims of May eighteenth, nineteen hundred and five, in favor of the Eastern Cherokees, shall be so construed as to carry interest on said item 2 up to such time as the roll of the individual beneficiaries entitled to share in said judgment shall be finally approved by the Court of Claims, and for the payment of said interest a sufficient sum is hereby appropriated."

On March 15, 1910, the Court of Claims entered an order approving the roll of individuals entitled to share in the distribution of item 2 of the judgment. By section 18 of the act of June 30, 1919 (41 Stat. 3, 21), Congress provided for the payment of certain interest on items 1 and 4 of the judgment, as follows:

"For payment of interest upon certain interest-bearing trust funds belonging to the Cherokee Nation, which funds arose from the judgment of the Court of Claims of May 18, 1905, in favor of said Nation, and were paid into and retained in the Treasury of the United States, as follows, to wit: On the amount of the fund which arose from item 1 of said judgment as such amount was determined and paid to the Secretary of the Interior on July 2, 1906, to be by him credited to the principal of the Cherokee school fund, interest at 5 per centum per annum from July 2, 1906, to and including May 26, 1910; on the amount of the fund which arose from item 4 of said judgment, as such amount was determined and paid to the Secretary of the Interior on July 2, 1906, to be by him credited to the principal of the Cherokee National fund, interest at 5 per centum per annum from July 2, 1906, to and including May 26, 1910; on the original principal sum of item 4 of said judgment, interest at 5 per centum per annum from July 1, 1893, to July 1, 1903, and on the amount of the interest thus accruing interest at 4 per centum per annum from December 29, 1905, to May 14, 1906; and on the aggregate of the sums of the interest for the last two periods hereinabove mentioned, interest at 5 per centum per annum from July 2, 1906, to the date of the passage of this act; and the sum of $27,500, or so much thereof as may be necessary to pay the interest above allowed, is hereby appropriated and authorized to be paid to the Cherokee Nation: Provided, That the Secretary of the Treasury is hereby authorized and directed to pay the amount arising from item 4 of said judgment, with interest thereon as hereinabove provided for, to the agent appointed by the Cherokee Nation acting through its principal chief to receive the same, said payment to be made immediately upon the approval of this act."

VIII

In full satisfaction of the judgment of the Court of Claims, and in pursuance of the directions contained in its decree, there was paid by the United States, out of appropriations carried by the several acts of Congress set out in Findings VII, the sum of $5,158,005.54, which was arrived at as follows:

[fol. 27]

Item 1		
Principal		$2,125.00
Interest at 5 per cent from Feb. 27, 1819, to Dec. 29, 1905 (date of filing of transcript of judgment with Secretary of Treasury)	$9,226.28	
Interest on $11,351.58 (the sum of above principal and interest), at 4 per cent from Dec. 30, 1905, to May 14, 1906 (date when mandate of Supreme Court issued)	169.18	
Total interest		9,395.46
Interest under act of June 30, 1919:		
At 5 per cent on $11,520.46 (sum of principal and total interest) from July 2, 1906, to Nov. 3, 1906	$197.27	
At 5 per cent on $11,174.53 ($11,520.46 less $345.93, attorney's fee) from Nov. 4, 1906, to May 26, 1910	1,988.45	
Total interest under act of June 30, 1919		2,185.72
Total paid under item 1		13,706.18

Item 2		
Principal		$1,111,284.70
Interest at 5 per cent from June 12, 1838, to Dec. 29, 1905	$3,753,249.90	
Interest on $4,864,534.60 (sum of principal and interest) from Dec. 30, 1905, to May 14, 1906, at 4 per cent	72,501.56	
Total interest		3,825,751.46
Additional interest under act of Mar. 4, 1909		161,324.92
Total paid under item 2		5,098,361.08

Item 3

Principal		$432.28
Interest at 5 per cent from Jan. 1, 1874, to Dec. 29, 1905	$691.46	
Interest at 4 per cent on $1,123.24 (sum of principal and interest) from Dec. 30, 1905, to May 14, 1906	16.75	
Total interest		708.21
Total paid under item 3		1,140.49

Item 4

Principal		$20,406.25
Interest at 5 per cent from July 1, 1903, to Dec. 29, 1905	$2,546.58	
Interest on $22,952.83 (sum of principal and interest) from Dec. 30, 1905, to May 14, 1906	342.10	
Total interest		2,888.68
Interest under act of June 30, 1919:		
At 5 per cent on $23,294.93 (sum of principal and total interest) from July 2, 1906, to Nov. 3, 1906	$398.89	
At 5 per cent on $22,595.46 ($23,294.93 less $699.47 attorney's fee) from Nov. 4, 1906, to May 26, 1910	4,020.75	
[fol. 28] At 5 per cent on $20,406.25 from July 1, 1893, to July 1, 1903	$10,203.12	
At 4 per cent on $10,203.12 from Dec. 30, 1905, to May 14, 1906	152.07	
At 5 per cent on $10,355.19 (sum of last two items) from July 2, 1906, to June 30, 1919	$6,728.03	
Total interest under act June 30, 1919		$21,502.86
Total paid under item 4		44,797.79

Total paid under:

Item 1	13,706.18
Item 2	5,098,361.08
Item 3	1,140.49
Item 4	44,797.79
Grand total	5,158,005.54

IX

The sum of $5,158,005.54, computed as set out in Finding VIII, was paid in various amounts on the following dates for the purposes described below:

On July 2, 1906, to the Secretary of the Interior on account of said item 1	$11,520.46
On the same date on account of item 3	1,140.49
On the same date on account of item 4	23,294.93
On July 14, 1906, to the attorneys for the Eastern Cherokees and the Eastern Emigrant Cherokees, fees amounting to	740,555.42
On Nov. 3, 1906, to the attorneys for the Cherokee Nation on account of item 2, fees amounting to	148,245.15
On various dates after July 2, 1906, and before final distribution of the fund arising from item 2, to Guion Miller for fees and expenses the sum of	103,749.74
On and after Mar. 15, 1910, to Guion Miller for per capita distribution among the Cherokees entitled to share in the fund the sum of	4,105,810.77
On or about Aug. 7, 1919, additional interest on item 4, pursuant to the act of June 30, 1919	21,502.86
On or about Aug. 7, 1919, to the Secretary of the Interior as additional interest on item 1, pursuant to the said act of June 30, 1919	2,185.72
Making a total sum, principals and interest, of	5,158,005.54

X

If the plaintiff is entitled to recover the amount found due by the Slade and Bender report, with interest at five per centum to March 4, 1895, $4,296,527.57, principal and interest, and interest thereon as a new principal, at five per centum per annum to March 15, 1910, less payment of the judgment, principal and interest, of the Court of Claims, it would leave a balance due the plaintiff of $2,216,091.76, with interest at 5 per centum thereon until paid, less $23,688.18 (interest payments August 7, 1919, under act of June 30, 1919), with interest to date of payment of said balance. This balance is arrived at as follows:

[fol. 29] Item 1

Principal	$2,125.00
Interest from Feb. 27, 1819, to Mar. 4, 1895, at 5 per cent	8,077.06
	10,202.06

Item 2

Principal	1,111,284.70
Interest from June 12, 1838, to Mar. 4, 1895, at 5 per cent	3,152,035.58
	4,263,320.28

Item 3

Principal	432.28
Interest from Jan. 1, 1874, to Mar. 4, 1895, at 5 per cent	457.68
	889.96

Item 4

Principal	20,406.25
Interest from July 1, 1893, to Mar. 4, 1895, at 5 per cent	1,709.02
	22, 115.27

Item 1	$10,202.06	
Item 2	4,263,320.28	
Item 3	889.96	
Item 4	22,115.27	
		4,296,527.57

Debits

Principal and interest to Mar. 4, 1895	4,296,527.57
Interest on same, Mar. 4, 1895, to Mar. 15, 1910, inclusive	3,228,959.82
	7,525,487.39

Credits

The sum of item 1, $11,520.46; item 3, $1,140.49; item 4, $23,294.93, paid July 2, 1906	$35,955.88	
Interest from July 2, 1906, to Mar. 15, 1910, at 5 per cent per annum	6,656.83	
Paid to attorneys for Eastern and Eastern Immigrant Cherokees, July 13, 1906	740,555.42	
Interest from July 13, 1906, to Mar. 15, 1910, at 5 per cent per annum	135,974.20	
Paid attorneys for Cherokee Nation Nov. 3, 1906	148,245.15	
Interest from Nov. 3, 1906, to Mar. 15, 1910, at 5 per cent per annum	24,954.60	
Expenses of making roll of Eastern and Eastern Immigrant Cherokees from July 2, 1906, to Mar. 15, 1910, and distributing warrants	103,749.74	
Interest from Oct. 5, 1908 (average date), to Mar. 15, 1910, at 5 per cent per annum	7,493.04	
Amount paid to Cherokees on the roll	4,105,810.77	
		5,309,395.63
Balance		2,216,091.76

CONCLUSION OF LAW

Upon the foregoing findings of fact the court decides, as a conclusion of law, that the plaintiff is not entitled to recover, and its petition is therefore dismissed.

Judgment is rendered against the plaintiff in favor of the United States for the cost of printing the record in this cause, the amount thereof to be entered by the clerk and collected by him according to law.

[fol. 30] MEMORANDUM OPINION

This case has already been before this court and the Supreme Court and the identical questions have been considered and decided by both courts. The matters for the determination of the court in the original case (40 C. Cls. 252; 202 U. S. 101) were the amounts, principal and interest, due the Cherokee Nation and the Eastern and Eastern Emigrant Cherokees under the Slade and Bender account, and those matters were finally settled and determined on March 15, 1910, by payment.

The court is now asked to settle the same question on a different basis, and by using a different rate of simple interest and compounding the same from March 4, 1895. The court is now asked to con-

sider the agreement of December 19, 1891, as a hard and fast contract to apply a five per cent rate to all of the items found due on March 4, 1895. In order to do this the court is asked to find that the five per cent interest promised by the Government to the Cherokees in paragraph 6 of the agreement of 1891, "so long as the money or any part" remained in the Treasury, related to the money found due in the Slade and Bender account, as well as to the cash payment of $8,595,736.12—a matter open to doubt with the weight of reason against such construction. The court is asked further to find that the failure of Congress to appropriate the payment of principal and interest called for by the Slade and Bender account amounted to a breach of contract that rendered the United States liable for the whole amount, principal and interest; and this, too, in the face of the proviso in the sixth paragraph of the agreement of 1891, "That nothing contained in this agreement shall have the effect to limit or impair any rights whatever the Cherokee Nation has in or to or over the lands herein ceded until it shall be so ratified by Congress: And provided further, That if this agreement shall not be ratified by Congress, and the appropriation of money, as herein provided for, made on or before March 4, 1893, it shall be utterly void."

The agreement of December 19, 1891, was ratified by the act of March 3, 1893, and part of the money consideration for the cession of the Cherokee outlet, $295,736 of the $8,595,736.12, was appropriated and the Secretary of the Interior was authorized to contract for the payment of the balance of $8,300,000. An appropriation of $5,000 was also made for the employment of experts to render a complete account of moneys due the Nation by the United States under the direction of the Secretary of the Interior. It was under this provision that the Slade and Bender account was rendered. This clearly shows that the five per cent interest did not relate to the money due under the Slade and Bender account provided for in a separate and distinct paragraph, but only to the $8,500,000 cash payment for the "Outlet."

The Supreme Court, in affirming this court, said that "the question of interest was a subject of difference while the negotiations were carried on, the determination of which was provided for in the 'treaty itself' in 1846, and in the 'agreement itself' in 1891, and is the same in principle as in the case of the Old Settlers." The Supreme Court said that the question as to the amount of recovery and the different questions involved had been left to the Court of [fol. 31] Claims and that the case had been properly decided. (202 U. S. 126-132.)

The court is now asked to construe the jurisdictional act as requiring it to decide the case again on a different basis from its original determination. The law stood then as it stands now. The agreement of December 19, 1891, on which the plaintiff bases its present claim, was considered by the Supreme Court in reaching its determination as to interest. United States v. Klein, 13 Wall. 128, 146.

Petition is dismissed. It is so ordered.

[fol. 32] VII. JUDGMENT

At a Court of Claims held in the City of Washington on the Twenty-third day of June, A. D., 1924, judgment was ordered to be entered as follows:

The Court, upon due consideration of the premises find in favor of the defendant, and do order and adjudge that the plaintiff, as aforesaid, is not entitled to recover any sum in this action of and from the United States; and that the petition herein be and the same is dismissed: And it is further ordered and adjudged that the defendant shall have and recover of and from the plaintiff, as aforesaid, the sum of Thirty-one dollars and seventy cents ($31.70), the cost of printing the record in this court to be collected by the Clerk, as provided by law.

By the Court.

VIII. PETITION FOR APPEAL—Filed September 19, 1924

From the judgment in the above entitled cause, on the 23rd day of June, 1924, in favor of the defendant, the plaintiff, by its attorney of record, on the 19th day of September, 1924, makes application for and gives notice of an appeal to the Supreme Court of the United States.

Frank J. Boudinot, Attorney of Record for The Cherokee Nation.

IX. ORDER ALLOWING APPEAL

It is ordered by the Court this 13th day of October, 1924, that the plaintiff's application for appeal be and the same is allowed.

[fol. 33] IN COURT OF CLAIMS

[Title omitted]

CLERK'S CERTIFICATE

I, F. C. Kleinschmidt, Assistant Clerk Court of Claims, certify that the foregoing are true transcripts of the history of proceedings; of the pleadings; of the argument and submission of case; of the findings of fact and conclusion of law and memorandum by the court; of the judgment of the court; of the plaintiff's application for appeal and of the order of court allowing said application, in the above-entitled cause.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at Washington City this 4th day of November, A. D., 1924.

F. C. Kleinschmidt, Assistant Clerk Court of Claims. (Seal of Court of Claims.)

Endorsed on cover: File No. 30,684. Court of Claims. Term No. 198. The Cherokee Nation, appellant, vs. The United States. Filed November 7th, 1924. File No. 30,684.

(5866)

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INDEX.

AUTHORITIES CITED.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1925.

No. 198.

THE CHEROKEE NATION, *Appellant*,

vs.

THE UNITED STATES, *Appellee*.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLANT.

STATEMENT OF THE CASE.

This appeal brings up for review the judgment of the Court of Claims rendered June 23, 1924, dismissing the appellant's petition. (R. 27.)

The amended petition in the Court below (R. 2), was filed under the Act of March 3, 1919 (40 Stat. 1316). This act provides "either party to have the

right to appeal to the Supreme Court of the United States as in other cases," and is in part as follows:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That jurisdiction is hereby conferred upon the Court of Claims, to hear, consider and determine the claim of the Cherokee Nation against the United States for interest, in addition to all other interest heretofore allowed and paid, alleged to be owing from the United States to the Cherokee Nation on the funds arising from the judgment of the Court of Claims of May eighteenth, nineteen hundred and five (Fortieth Court of Claims Reports, page two-hundred and fifty-two) in favor of the Cherokee Nation. The said court is authorized, empowered, and directed to carefully examine all laws, treaties, or agreements, and especially the agreement between the United States and the Cherokee Nation of December nineteenth, Eighteen hundred and ninety-one, ratified by the United States March third, Eighteen-hundred and ninety-three (Twenty-seventh Statutes at Large, page six-hundred and forty, section ten), in any manner affecting or relating to the question of interest on said funds, as the same shall be brought to the attention of the Court by the Cherokee Nation under this Act. And if it shall be found that under any of the said treaties, laws or agreements interest on one or more of the said funds, either in whole or in part, has not been paid and is rightfully owing from the United States to the Cherokee Nation, the court shall render final judgment therefor against the United States, and in favor of the Cherokee Nation, either party to have the right to appeal to the Supreme Court of the United States as in other cases. The said claim shall be presented within one year after the pas-

sage of this Act by petition in the Court of Claims by the Cherokee Nation as plaintiff against the United States as defendant, and the petition shall be verified by the attorney employed to prosecute said claim by the Cherokee Nation acting through its principal chief. A copy of the petition shall be served upon the Attorney General of the United States, and he, or some attorney from the Department of Justice to be designated by him, is hereby directed to appear and defend the interests of the United States in said cause. The law and practice and rules of procedure in said courts shall be the practice and law in this case."

We will file as an appendix to this brief a full statement of the history of the controversy between the appellant, and the United States, together with all of the pertinent statutes and findings of the Court of Claims in the former suit between these parties, *Cherokee Nation v. United States*, 202 U. S. 101 (40 Ct. Cl. 252), and shall make only a concise statement of the facts herein.

This suit was brought to recover an alleged balance of interest due the Cherokees under the agreement of December 19, 1891 (Findings of Fact III, R. 14) as this agreement was interpreted and construed by the Court of Claims and this Court in the former case, as will be more particularly set out and discussed in the argument herein.

As shown in the findings of fact in the former case (202 U. S., 115), a large part of the costs of the removal of the Eastern Cherokees to the Indian Territory had been charged by the United States to the $5,000,000 interest-bearing treaty fund, which the United States had in trust for the Cherokees arising out of the purchase of their Eastern lands. The exact

amount of this removal cost charged to the Indians was ascertained in the former suit to be $1,111,284.70. This sum constituted Item 2 of the fund reported by government accountants, Slade and Bender, to be due the Cherokees with interest from June 12, 1838 until paid, and was the amount in dispute in the former case. The controversy over this item, and other items included in the Slade and Bender report, had not been settled when the United States under the Act of March 2, 1889, Sec. 14 (25 Stat. 1005) appointed Commissioners to negotiate with the Cherokees for the purchase of the Outlet (Findings of Fact III, R. 14), containing 8,144,682.91 acres. In the negotiations which followed the Indians demanded as "a condition precedent" to the sale of the land that the United States should settle and pay the amounts found due under these various treaty stipulations, upon a proper accounting between them (202 U. S. 106, 108). In the said Agreement of December 19, 1891, ratified by the Act of March 3, 1893 (27 Stat. 612, 640-643; Rec. 14 Finding III), the United States agreed to have this accounting made without delay, and if the Cherokee Nation should approve the account, the Congress should, if then in session, or if not then in session, then at the next succeeding Congress, appropriate the amount to pay it.

On May 17, 1893 a deed of cession was executed and delivered by the Cherokee Nation to the United States, (Findings of Fact III, R. 16). The United States immediately took possession of the outlet and in pursuance of the agreement the Secretary of Interior promptly employed Slade and Bender to prepare the account. On April 28, 1894, these accountants filed their

report which is set out in the Findings of Fact by the Court at page 17 of the Record.

This account was approved by the Cherokees and transmitted to Congress January 7, 1895, and the aggregated principal and interest, amounted to $4,296,-527.57 (Findings of Fact III, R. 17).

Congress adjourned without appropriating for the payment of this sum, but by the Act of March 2, 1895 (28 Stat. 795) referred the matter to the Attorney General to review and report upon the conclusions of law reached by the Secretary of the Interior in approving the report of the government accountants. The Attorney General was unable to concur in the Secretary's conclusion as to Item 2 of the account and advised Congress that the United States were not liable for the costs of the removal of the Cherokees to the Indian Territory, and that the $1,111,284.70 withdrawn from the trust funds held for the Indians was properly withdrawn.

This controversy was next transferred to the Court of Claims by the Act of July 1, 1902 (32 Stat. 726) which will be hereinafter fully discussed. In the suits which followed and were consolidated in the Court of Claims in *Cherokee Nation v. United States, supra,* the United States conceded the items set out in the Slade and Bender report, except Item 2 for the removal costs, and the Court of Claims on May 18, 1905, gave judgment for the Cherokee Nation in the very terms of the Slade and Bender report (Findings of Fact V, R. 18-19), (40 Ct. Cl. 252, 202 U. S. 101.)

After the affirmance of this judgment, Congress by the Act of June 30, 1906 (34 Stat. 634, 644) made an appropriation to pay the judgment, "together with such additional sum as may be necessary to pay inter-

est, as authorized by law." (Findings of Fact VII, R. 19-20.) The Court of Claims and this Court, in their opinions, considered the agreement of 1891, in determining the issue of whether or not the cost of the removal of the Cherokees was chargeable to the Indians or to the United States. In these opinions it is said in effect that this sum was a part of the purchase price of the Outlet, and was a liquidated debt of the United States which was to be paid on the effective date of the agreement, to wit, by the end of the Congress then in session which expired March 4, 1895, and that time was of the essence of the Contract, the Indians having the right to immediate payment. (202 U. S. 121.)

Having had it made fixed and certain that the items set out in the Slade and Bender report were due, the Cherokee Nation applied to the accounting officers of the government for a settlement, and insisted that under the agreement, as construed in the opinions of the courts, the sum of $4,296,527.57 which should have been paid March 4, 1895, as the purchase price of the Outlet, bore interest at the rate of five per cent from that date until paid. These officials, however, ignored the provisions of the agreement specifying the time when the appropriation was to be made and the money was to be paid, and paid the Cherokees, by partial payments (Findings of Fact VIII, R. 21), as if the agreement had contained no such provision. The Cherokee Nation brought the matter to the attention of Congress and that body eventually again relegated the Cherokee Nation to the Court of Claims by the passage of the Act of March 3, 1919, *supra.*

The petition alleges the facts as above set out, and

further avers that interest is due and owing the plaintiff under a provision of the sixth paragraph of the Agreement of Dec. 19, 1891, which is as follows:

* * * * * * * *

Sixth. That in addition to the foregoing enumerated considerations for the cession and relinquishment of title to the lands hereinbefore provided the United States shall pay to the Cherokee Nation, at such time and in such manner as the Cherokee national council shall determine, the sum of eight million, five hundred and ninety-five thousand, seven hundred and thirty-six and twelve one-hundredths ($8,595,736.12) Dollars in excess of the sum of seven hundred and twenty-eight thousand three hundred and eighty-nine and forty-six one-hundredths ($728,389.46) Dollars the aggregate of amounts heretofore appropriated by Congress and charged against the lands of the Cherokees west of the Arkansas River, and also in excess of the amount heretofore paid by the Osage Indians for their reservation. *So long as the money or any part of it shall remain in the Treasury of the United States after this agreement shall have become effective, such sum so left in the Treasury of the United States shall bear interest at the rate of five per centum per annum, payable semi-annually:* * * * (Italics ours) and also under the Act of September 11, 1841, which is as follows:

> "All funds held in trust by the United States, and the annual interest accruing thereon, when not otherwise required by treaty, shall be invested in stocks of the United States, bearing a rate of interest not less than five per centum per annum." (5 Stat. 465.)

Finally it is averred that upon a correct statement of the account between the Cherokees and the United States there is a balance due the Cherokees as of Mar. 15, 1910, of the sum of $2,377,592.35, upon which the petitioner is entitled to interest at five per cent until paid, the United States at final payment to be credited with the interest payments of August 7, 1919, aggregating $23,688.18. The prayer of the petition is for judgment for this sum, "and for such additional and other sums as may be necessary to pay any further, or other, interest authorized by law." (R. 9, 10.)

A general traverse was entered as provided by the rules of the court below. (R. 11.)

The Court below in its Findings of Fact (R. 11-25) recites the pertinent statutes and the history of the matter very much as set out in the allegations of the petition, and in finding X, says (R. 23):

> "If the plaintiff is entitled to recover the amount found due by the Slade and Bender report, with interest at five per centum to March 4, 1895, $4,296,527.57, principal and interest, and interest thereon as a new principal, at five per centum per annum to March 15, 1910, less payment of the judment, principal and interest, of the Court of Claims, it would leave a balance due the plaintiff of $2,216,091.76, with interest at 5 per centum thereon until paid, less $23,688.18 (interest payments August 7, 1919, under act of June 30, 1919) with interest to date of payment of said balance."

In its conclusions of law the Court decided that the plaintiff is not entitled to recover and dismissed the petition.

In the Memorandum Opinion filed the Court based its conclusions on the following propositions:

(1) That the identical questions raised by the petition had been decided in the former case; (2) That whether the interest clause of the agreement of 1891 related to the funds set out in the Slade and Bender report was "a matter open to doubt with the weight of reason against such construction"—a doubt later solved against the petitioner; (3) That the failure of Congress to appropriate the payment of the amount due under the Slade and Bender account did not amount to a breach of contract in the face of the provision in the agreement that it was not to be effective if not ratified before March 4, 1893, and (4) That the court was asked to construe the jurisdictional act as requiring it to decide the same case on a different basis although the law remained the same.

It is the contention of the appellant that all of these conclusions of the court below are erroneous.

QUESTION PRESENTED.

The specific question presented in the Court below, and to be determined on this appeal, is whether or not, under the agreement of December 19, 1891, the $1,134,248.23 principal and the $3,162,279.34 interest aggregating on March 4, 1895, $4,296,527.57 (Findings of Fact III, R. 17), a part of the purchase price of the land sold and delivered, which should have been then paid or restored to the interest-bearing treaty funds, became a new principal and bore interest at five per cent; and if so, what balance is now due the appellant.

The appellant assigns the following errors:

ASSIGNMENTS OF ERROR

1. In dismissing the plaintiff's petition.

2. In not giving judgment for the plaintiff.

3. In holding that the identical questions raised by the plaintiff's petition have been before considered and decided.

4. In not holding that the Jurisdictional Act of March 3, 1919 (40 Stat. L. 1316) waives the plea of any former adjudication of the questions presented in the plaintiff's petition.

5. In not holding and deciding that the jurisdictional Act of March 3, 1919 (40 Stat. L. 1316), authorized the Court to go behind the judgment of May 18, 1905 (40 C. C. L., 252), and render judgment for the plaintiff for interest from the United States, under its Laws, Treaties and Agreements, in addition to all interest heretofore allowed and paid.

6. In not holding and deciding that the plaintiff was entitled to recover interest under the agreement of 1891 on the $4,296,527.57 due and payable the plaintiff March 4, 1895.

7. In not holding and deciding that the plaintiff was entitled to recover interest from March 4, 1895, the date fixed for payment by agreement of 1891, as follows:

On the sum of $4,263,320.28, the aggregate of principal and interest of Item 2, as an interest bearing trust

fund under the Treaty of August 6, 1846 (Art. 9), and the finding of the Senate on September 5, 1850 (Sen. Journal, 31st. Cong. 1st. Sess. p. 602).

On the sum of $10,202.06, the aggregate of principal and interest of Item 1, as an interest bearing trust fund under treaties of 1819, 1835 (Art. 10), and 1866 (Art. 23).

On the sum of $889.96, the aggregate of principal and interest of Item 3, as an interest bearing trust fund under treaty of 1866 (Art. 23).

On the sum of $22,115.27, the aggregate of principal and interest of Item 4, as an interest bearing trust fund under the treaties of 1835 (Art. 10) and 1866 (Art. 23).

8. In not holding and deciding that the plaintiff was entitled to recover interest under the Act of September 11, 1841 and the treaty of July 19, 1866, on the sum of $4,296,527.57, due and payable to the Plaintiff March 4, 1895, said sum being the aggregate of principal and interest of the several items 1, 2, 3, and 4, as interest bearing trust funds.

9. In not holding and deciding that the jurisdictional Act of March 3, 1919 (40 Stat. L. 1316), authorized the court to render judgment for any additional interest arising since the judgment of May 18, 1905 (40 C. Cl., 252).

Under the assignments of error the following propositions are submitted:

I.

The identical questions presented by the petition have never been before considered and decided.

II.

The right of the appellant to recover interest on the whole of the purchase price of the Outlet from March 4, 1895 is not foreclosed by the judgment of May 18, 1905.

III.

In any event, the Court is authorized to render final judgment for any interest arising since said judgment of May 18, 1905.

ARGUMENT.

I.

The Identical Questions Presented by the Petition Have Never Before Been Considered and Decided.

As shown in the statement of the case, when the Slade and Bender report was transmitted to Congress, and Congress did not comply with the agreement and appropriate the amounts found due in that report, it referred the matter to the Attorney General for a review of the conclusions of the Secretary of the Interior that these amounts were due, and a report thereon. The Attorney General differed with the Secretary and specifically held that the United States were not liable to pay the costs of the removal of these Indians to the Indian Territory. The jurisdictional act of July 1, 1902, authorizing the Cherokee Nation to sue in the Court of

Claims for "any claim which the Cherokee Tribe or any band thereof, arising under treaty stipulations, may have against the United States." (Findings of Fact III, R. 18) was passed for the purpose of determining and settling the difference which had arisen between the Secretary and the Attorney General, and ascertaining if, under treaty stipulations, any sum or sums were due the Cherokees.

The Attorney General and the Secretary differed only as to Item 2 of the Slade and Bender report, and in the suit which followed, the correctness of the amounts set out in Item 2 was conceded, provided the United States were liable as a matter of law for the removal costs. There was no suit instituted or authorized to be instituted under the agreement of 1891, and until it was finally settled whether or not Item 2 particularly was a charge against the Government, it could not be determined that anything was due under the agreement. The question of whether or not all the interest due under the agreement has been paid could not have been determined until the principal due under the agreement was fixed and certain. There was no authorization to the Court to give judgment for any amount which might be due under the agreement in excess of the amounts due under "treaty stipulations."

CHEROKEE NATION v. UNITED STATES, 202 U. S. 101.

A review of the case of the Cherokee Nation v. United States, 202 U. S. 101 is pertinent to this discussion and shows that no judgment was ever entered under the agreement of 1891.

Under the jurisdictional act of 1902, the Cherokees filed three suits in the Court of Claims which were consolidated and heard together. This act authorized the court to *examine, adjudicate and consider* any claim which the Cherokee or any band thereof, might have *arising from treaty stipulations.* Under this act it was insisted on behalf of the Indians that the Slade and Bender report made in pursuance of the agreement of December 19, 1891, was an award or account stated, and in the nature of *res judicata,* and was binding upon the United States as such. It was further contended on behalf of the Indians, however, that if this was not a binding account stated and the treaty stipulations and appropriation statutes were examined and considered by the Court, the $1,111,284.70 removal charges had been improperly charged against the $5,000,000 treaty fund held in trust for them, and they were entitled to judgment therefor with interest at 5 percent until payment.

The United States resisted the claim that the Slade and Bender report was an award or account stated, binding upon the United States. It was insisted on behalf of the United States that the "scope and purpose" of the jurisdictional act was to determine whether or not there was any claim on behalf of the Cherokee, *arising under treaty stipulation,* and that looking to the treaties and appropriations statutes, the removal charges against the Indians were right and proper.

The Court of Claims, Judge Wright dissenting, gave judgment for the amount (and in the words of the report), found due by the report of Slade and Bender under treaty stipulations. While giving judgment for this amount, no majority of the court agreed upon the basis upon which the judgment was given.

Chief Justice Nott, who rendered the opinion of the Court, based his opinion upon the ground that it was a case of sale and delivery and non-payment of the purchase money for the thing sold and delivered, for which the Cherokees at that time "had the right to immediate payment." (202 U. S. 121, 122.)

Judge Weldon concurred in a separate opinion to the effect that it was immaterial as to whether or not the Slade and Bender report was treated as an account stated, since it was conceded correct, and was a part of the consideration for the sale of the Outlet.

Judge Peele concurred in the judgment, but rested his opinion upon an examination of the treaties and appropriations statutes, on the ground that the United States were liable to pay the expense of the removal, "and therefore to pay this conceded balance." (202 U. S. 123.)

Judge Wright in dissenting, held that upon an examination of the treaty stipulations the United States were not liable to pay for removal of the Cherokees and therefore the latter were not entitled to judgment.

Justice Howry did not sit in the case.

This Court (p. 123) pretermitted the question, saying:

"We agree that the United States were liable, and think the liability might well be rested on both grounds, that is, failing one it could be sustained on the other, but we do not deem it necessary to set forth in our own language what has already been so well stated by Chief Justice Nott and Judges Weldon and Peele."

The judgment of the Court of Claims was not that the plaintiff should recover under the agreement of 1891, but that they recover the various amounts found in the report of Slade and Bender, as due under *treaty*

stipulations. This was the only thing that the majority of that Court concurred in, to-wit, that the United States were liable under treaty stipulations for these items, with interest, and the judgment was in accordance with what the United States contended was "the scope and purpose" of the jurisdictional act. In the brief filed on behalf of the United States in this Court in the former case, at page 46, in asserting that the language of the jurisdictional act "precludes the idea of a claim based upon the Slade and Bender report," it is said:

> "Rightly interpreting the scope and purpose of this statute, Judge Peele, instead of holding himself bound by the Slade and Bender report, made examination into the treaties and statutes discussed and interpreted in that report, with a view to determining the claim as *arising under treaty stipulations,* and as a result decided that the conclusions of law reached in the Slade and Bender report were correct. Judge Wright approaching the subject in the same way, reached the opposite conclusion."

We submit, therefore, that the judgment in the former case was in accordance with the "scope and purpose" of the act, and that the sole power conferred upon, and exercised by the Court was to determine the issue raised as to whether under specified treaties the amounts found in the Slade and Bender report, or any amounts, were due. The Courts not only found that these amounts were due, but went further and said that by the agreement these amounts were declared to be part of the purchase price of the land and a liquidated debt, due by the United States on the effective date of the agreement. (202 U. S. 121.) The judgment of the

Court was not for the balance of the purchase price of the land, not for the liquidated debt due on the effective date of the agreement, to-wit, March 4, 1895, for the obvious reason that the suit was authorized and brought to determine solely whether anything was due under the "treaty stipulations," and to fix a liability for any such sum by judgment.

Whether or not the whole of the purchase price for the Cherokee Outlet, this liquidated debt of March 4, 1895, with the proper interest thereon, if any, has been paid, was not adjudicated in the original suit and the identical questions presented in the petition in this case have not been before considered and decided, and could not have been determined under the former jurisdictional act.

CLEAR DISTINCTION BETWEEN JURISDICTIONAL ACTS OF JULY 1, 1902, AND MARCH 3, 1919.

There is a clear distinction between the two jurisdictional Acts. In the former Act jurisdiction was conferred to adjudicate any claim which the Cherokees might have "arising under treaty stipulations" only. No mention is made of any claim arising under the agreement of December 19, 1891, providing for the cession of the Outlet and the payment of the purchase price therefor. It was necessary to determine first the amount due under "treaty stipulations" before the entire purchase price of the land could be known. Congress did not assume that after the purchase price became fixed and certain it would not be paid, and did not confer upon the Court of Claims authority to give judgment for this purchase price in advance of the refusal of the Executive Department to carry out the

agreement to pay the purchase price after the amount thereof became fixed and certain.

While the former jurisdictional act limited the court to giving judgment for what was due the Indians "under treaty stipulations" the present act directs the court "to carefully examine all laws, treaties or agreements, and *especially the agreement * * * of Dec. 19, 1891*" (Italics ours) and to render judgment for any interest rightfully owing thereunder, in addition to interest already paid. This language was purposely used by Congress because of the controversy in the former case wherein the Government contended that "the scope and purpose" of the act was merely to determine whether under treaty stipulations the cost of the removal of the Cherokees should be borne by the United States or by the Cherokees, which contention Justices Peele and Wright had upheld. In the light of this controversy, Congress made "the scope and purpose" of this act clear and certain. The Court was not to be confined in its inquiry to "treaty stipulations" nor to any one statute or agreement, but was directed to examine all treaties, statutes and agreements "in any manner affecting or relating to the question of interest on said funds as the same shall be brought to the attention of the court by the Cherokee Nation under this Act," and further to give judgment if under any of them interest was rightfully owing.

It must be remembered that when Congress was considering the present jurisdictional act, it was fully advised that the United States had gotten this great area of land and although promising to pay the whole of the purchase price at once, had for many years held both the land and the money. They were advised that the courts had held that the Indians were entitled

to "immediate payment" at the time of the cession, by the language of the agreement and in directing the especial examination of the agreement, Congress had the specific purpose in mind that the court might pass upon the contention urged for years before the Congress by the Cherokees that under this agreement the whole of the purchase price of the land, both principal and interest, was after March 4, 1895, an interest bearing fund due them by the United States, and that full interest thereon had not been paid. The examination of the agreement directed to be made, therefore, was to ascertain if the accounting officers of the government in settling the amount due the Indians, had paid them the whole interest due thereunder, not whether they had been paid the proper interest upon the judgment merely. That the court is authorized to determine whether under these specified laws, treaties and agreements interest has been computed upon the proper principal, at the right rate and from the correct date—in fact to determine any question which affects the Indians right to additional interest—is conclusively shown by the provisions of the act last above quoted, to examine all the laws, treaties and agreements * * * "*in any manner affecting or relating to the question of interest on said funds,* as the same shall be brought to the attention of the Court by the Cherokee Nation under this Act." There could be no broader direction to the Court to determine every question of interest and conclusively evidences the intent of Congress that the Court was not to look to the judgment alone to determine whether the proper interest had been allowed and paid.

We insist that the effect of the opinion in the former case, and the proper construction of the agreement, is

that on March 4, 1895, a new principal was created for each item found due in the report of Slade and Bender, which became fixed and certain by the judgment in the former case, and that these aggregate new principals totaling at that time $4,296,527.57, were or should then have been restored to the interest-bearing treaty funds, and bore interest at five per cent. The payments made by the United States left an unpaid balance on this account, and for this balance this suit is brought.

The Court below misapprehended the purpose of this suit under this Act when it declared in its opinion that—

> "—the matters for determination in the original case (40 C. Cls. 252; 202 U. S. 101) were the amounts, principal and interest, due the Cherokee Nation and the Eastern and Eastern Emigrant Cherokees under the Slade and Bender account"

and—

> "the Court is now asked to settle the same question on a different basis by using a different rate of simple interest and compounding the same from March 4, 1895."

This suit is not brought to determine the amount due the Cherokees under the Slade and Bender report; that was finally settled by the judgment in the original case, and we are not asking that this issue be reopened nor settled on a different basis, or by using a different rate of interest. We are asking that since the Court in the original case gave judgment for what was due under Treaty stipulations as found in the Slade and

Bender report, and that alone, but further held in its opinion that this was a liquidated obligation of the United States as of March 4, 1895, under the agreement of 1891, the Court, as directed by the new jurisdictional Act, look to that agreement and to the payments already made to ascertain if any additional interest is rightfully owing to the Cherokees. Indeed, in the Court below we contended that in determining whether or not there is any additional interest due the plaintiff under the laws, treaties and agreements, in addition to any interest already allowed and paid, it was only necessary for the court to look to the judgment in the former case, the agreement of 1891, which fixed the date of final payment and the interest clause of said agreement. The judgment in the former case fixed the purchase price of the land, by enumerating the amounts due under four specified items, with the dates from which interest was to run, and the rate of interest. The agreement as construed in the opinion of the Court (202 U. S. p. 123) in turn fixed the 4th day of March, 1895, as the final date of payment. Upon that date the purchase price of the land became due and payable. This purchase price was the principal sums as set out in the Slade and Bender report, with the interest on each item, which aggregated March 4, 1895, $4,296,-527.57 (Finding X-R. 23). The Cherokees had sold and delivered the land to the United States. The United States had promised to pay this purchase price at the end of the Congress which adjourned March 4, 1895. By refusing to do this, they "are placed in the position of having broken the letter and spirit of their agreement" (202. U. S. p. 123.) Upon this subject, this Court in the oringinal case said (202 U. S. p. 121):

"The case is thus put by Chief Justice Nott: * * * 'Interpreted in the light of the long, sore controversy which had existed between the parties, it is plain that the Cherokees believed the agreement to mean (and the United States allowed them so to believe), that all of their claims and rights and equities were to be reopened and reexamined *de novo;* and that upon the faith of that belief they made a cession of the Outlet. In the opinion of the court this case is simply one to recover purchase money upon a contract of sale. Ordinarily, in such a case, the cession would not be made, the deed would not be delivered, until the purchase money is paid or secured or, at least, the amount be ascertained and liquidated. In this case both parties wanted to expedite the transaction. It was important for the United States that the cession of the territory should be made immediately; it was desirable for the Cherokee Nation that the purchase money should be paid soon. But, nevertheless, the Cherokee Nation had the right to immediate payment, and the agreement intended to secure to them the next thing to it—the right to an early payment. The accounting was merely a means to an end. The end was the immediate payment, as near as might be, of the whole consideration to be given for the cession of the Outlet. When the cession was made the purchase money was due; the only thing remaining, which was the object of the accounting, was to ascertain the exact amount. This is not the case of a party prosecuting an unliquidated debt, but a case of sale and delivery and nonpayment of the purchase money for the thing sold and delivered. The United States were willing to pay; the Cherokee Nation wanted the payment made at the earliest possible day; both parties agreed upon a method by which it should be paid as nearly immediately as was possible. The United States were to render their account "without delay;" if

the Cherokee Nation accepted it, the amount was to be appropriated by Congress; such "appropriation to be made by Congress, if then in Session, and if not, then at the session immediately following such accounting." If the Cherokee Nation did not accept the accounting, or regarded it as incorrect or unjust, and carried it into the courts and recovered a judgment, Congress was to appropriate "at its next session after such case shall be finally decided." Nothing was left to the ordinary uncertainties and procrastinations of legislation, and no agreement could have made the obligation to pay promptly more unequivocal and specific. Time was of the essence of the contract, so far as the words of the parties could make it. * * *. The Cherokee Nation has parted with the land, has lost the time within which it might have appealed to the courts and has lost the right to bring the items which it regards as incorrectly or unjustly disallowed to judicial arbitrament, and the United States are placed in the position of having broken and evaded the letter and spirit of their agreement."

2. RES JUDICATA.

The defendant below insisted that the questions raised in the petition were *res judicata,* and while the opinion of the Court does not, in terms, sustain this plea, the Court in effect says that the original case determined and settled the questions raised in this. Aside from our contention that the questions presented in the petition in this case have never been considered and decided by any court, we now insist that conceding *arguendo* only, that they might have been considered by the court in the former case, despite the limitations in the Jurisdictional Act of July 1, 1902, the present Jurisdictional Act plainly directs the court

to examine the laws, treaties and agreements, passed long prior to the institution of the former case, and which were examined in that case, and *especially the agreement of 1891,* and to give judgment thereunder for any interest rightfully owing to the Cherokee, in addition to any interest already paid. This is a specific authorization to go behind the judgment in the former case to determine if additional interest is due, and is a statutory bar to the plea of a former adjudication.

There was a similar effort in the former case to invoke former adjudications as a bar to recovery, and it was contended by the United States that the Cherokee Nation was estopped by the judgment in *Cherokee vs. U. S.* 27 C. Cl. 1, and in addition had receipted in full for all its claims against the United States. The Court of Claims held, as shown in the excerpt from its opinion below, that if the case was to be decided on technical defenses it had already been decided against the Cherokees. That Court said (40 C. Cl. 321):

> "That is to say, the court, or the accountants, were to go behind statutory and treaty bars and receipts in full and were to consider 'any alleged or declared amount of money promised but withheld', 'under any of said treaties or laws.' This meant that there were to be no technical defenses set up, no pleas of *res judicata,* no releases or relinquishments, compromises or settlements; or it meant nothing. For if the proposed suit of the Cherokees was to be decided *strictissimi juris,* i. e., upon technical defenses, it had already been decided against them." This was quoted with approval by this Court (202 U. S. 121).

The directions to the Court in the present Jurisdictional Act are just as broad and as direct as in the former Act. If "statutory and treaty bars and receipts in full" could not be relied upon by the United States in the former case judgment and payments thereunder cannot be relied upon to defeat the payment of any interest in addition to that paid, owing under former treaties, laws and agreements. Since under the former act, to decide the case "*strictissimi juris, i. e.,* upon technical defenses, it had already been decided against them" the court refused to entertain technical defenses and pleas of *res judicata,* surely in the present case the direction to re-examine the laws, treaties and agreements considered in the former case, and give judgment for any interest thereunder rightfully owing the Cherokees in addition to interest already paid, is a plain statutory bar to the plea of *res judicata.* Congress manifestly intended something more in conferring jurisdiction upon the court to examine these laws, treaties and agreements, which already had been examined in the former case, than that the Cherokee might come into court to be immediately turned out on account of the judgment in the former case.

There has been and could have been no former determination of the question in this suit, to wit, whether or not any interest in addition to that already paid is due the Cherokees. This can be determined only by examining, among other things, transactions since the judgment. A judgment rendered before the payment of any interest upon the amounts found due by said judgment, cannot be pleaded as *res judicata* in a suit for interest in addition to that paid since said judgment. The Act recognizes that certain interest

had been paid since said judgment, recites that additional interest is alleged to be owing and authorizes the court to determine whether such additional interest is due and unpaid, and in determining this question, to look to the appropriate treaties and agreements, in any manner relating to the question of interest and especially the agreement of 1891.

Again, we are not attempting to evade or set aside the judgment of the court fixing the liability of the United States to pay the amounts due under treaty stipulations as found by the Slade and Bender report. We are invoking this judgment, and are asking the Court, in its light, and that of the payments since made to the Cherokee, to examine especially the agreement of December 19, 1891, and determine if the whole interest on the liquidated debt therein set out has been paid by the accounting officers of the government, or if a part thereof is due and unpaid. If, under the former construction of the agreement, to wit, that the purchase price of the land was due March 4, 1895, and that the agreement provided for interest at 5 per cent on this purchase price so long as the money remained in the Treasury, the whole 5 per cent interest on the total purchase price has not been paid, then, it is submitted, the Court is directed to give judgment for any unpaid balance. The claim for this unpaid balance has not before been asserted in court, and is not *res judicata.*

POWER OF CONGRESS TO WAIVE A FORMER ADJUDICATION.

The assertion of counsel for the defendant in the Court below that the court was powerless to consider

the claim presented under the Jurisdictional Act because the matter is *res judicata,* would seem to be that counsel insisted that a former judgment is a bar to the jurisdiction of that court. Of course, this cannot be true. It is merely a plea in bar of the action brought and is in no sense jurisdictional. The Jurisdictional Act conferred upon that court authority to consider the plaintiff's claim for additional interest, and the plea of the former recovery by the plaintiff against the United States did not deprive this court of jurisdiction to consider this claim for interest.

That the plea of the former recovery is not jurisdictional is conclusively established by the fact that such prior judgment must either be pleaded or proved. The Supreme Court said in *Southern Pacific R. R. v. U. S.,* 168 U. S. 1, 57:

> "There are cases in which a party may lose the benefit of a prior judgment, in respect of matters determined by it, when, having an opportunity to plead such judgment, he fails to do so."

Ordinarily, where the former adjudication is relied on as a bar to the action it must be specially pleaded, but if it is set up merely as conclusive of some particular fact formerly in issue and adjudicated, it need not be pleaded. *Harris, etc., v. Stern* (*CCA. 2nd Ct.*) 229 Fed. 43, 47.

Of course, if the prior judgment must be either pleaded or put in evidence in order to be relied on, it is not jurisdictional.

If a party loses the benefit of a prior judgment by failure to plead or prove it, it follows, of course, that parties may waive the conclusiveness of such a judgment. In *Pratt v. Wilcox Manufacturing Co.,* 64 Fed. 589, the court says:

"It is undoubtedly competent for parties to waive the conclusiveness of a judgment and the matter is therefore, pursuant to stipulation, still at large between the parties."

If private litigants can waive the plea of a former recovery, Congress, of course, can waive the benefits of such recovery, and we have effectually demonstrated that Congress in the Jurisdictional Act authorized this court to go behind the former judgment and ascertain if, regardless of such judgment, any additional interest arising prior to such judgment is due the Cherokee, under the laws, treaties and agreements of the United States.

In this connection, the court's attention is respectfully invited to the case of *Braden v. United States*, 16 Ct. Cls., 389, wherein the court discusses at great length the matter of the construction of jurisdictional acts. Among other things, the court in that case says:

"1. Where Congress refers a claim, or class of claims, with instructions to the court to render judgment for whatever may be found to be justly and equitably due to the claimant (or some such equivalent expression), full effect should be given to the remedial purpose of the statute, but at the same time the court should be vigilant to see that it is not applied to matters whereof Congress might have been ignorant when it was passed, or made to work results which probably were beyond the legislative purpose of its framers.

"2. Where a claimant could not have maintained an action in this court, either for want of jurisdiction or because his demand was barred by lapse of time, the purpose of Congress in passing an act of reference ordinarily must be deemed to have been to confer jurisdiction or to take the case out of the statute of limitations, and not to validate or affect the cause of action." (P. 410.)

In the memorandum opinion of the Court of Claims (R. p. 26) the Court, after stating "the agreement of 1891 on which the plaintiff bases its present claim was considered by the Supreme Court in reaching its determination as to interest," cites *United States v. Klein,* 13 Wall. 128. Unless the Court of Claims concluded that Congress, acting for the United States, did not have the power to waive estoppel of former adjudication, which the United States had the right to set up, then it is difficult to understand the significance of the citation.

Upon a reference to the case of *United States v. Klein, supra,* it will be observed that the conclusions of the Court stated therein do not bear in the most remote degree upon the propositions involved herein.

It is true, however, that this identical question was involved in the case of *Nock v. United States,* 2 Ct. Cls., 451. Counsel for the United States there argued that Congress had no judicial power and could not authorize the Court of Claims to set aside a judgment and award a party a new trial. The court in response to this contention stated, at page 457:

> "If the objections were allowed to rest upon the grounds whereon the assistant solicitor has placed them, I apprehend that they would be found fatal to the case. It is unquestionable that the Constitution has invested Congress with no judicial powers; it cannot be doubted that a legislative direction to a court to find a judgment in a certain way would be little less than a judgment rendered directly by Congress. But here Congress do not attempt to award judgment, nor to grant a new trial *judicially;* neither have they *reversed* a decree of this court; nor attempted in any way to interfere with the administration of justice. Con-

gress are here to all intents and purposes the defendants, and as such they come into court through this resolution and say that they will not plead the former trial in bar, nor interpose the legal objection which defeated a recovery before, but that they thus consent upon the condition that the recovery, if any, shall be had, shall not exceed a certain amount. The claimant has no rights here except under this consent, and he limits his demands accordingly. If the court should find a larger amount to be due, the excess would be remitted and judgment entered for the amount demanded in the claimant's petition. Apart from this view of the question, it would be enough to say that the defendants cannot be sued except with their own consent; and Congress have the same power to give this consent to a second action as they had to give it to a first."

In the Nock case, *supra,* the identical question was involved, and the opinion of the Court of Claims not having been reversed, it was held that Congress would have the right to waive the plea of *res adjudicata.*

In the case of U. S. vs. Grant, 110 U. S. 205, Congress authorized the Court of Claims to enter up a different judgment from that already entered, upon the same facts and under the same law. This is a clear waiver of a former adjudication, and from the judgment of the Court of Claims under this new jurisdictional act there was no appeal allowed.

II.

The Right of the Plaintiff to Recover Interest on the Whole of the Purchase Price for the Outlet from March 4, 1895, is Not Foreclosed by the Judgment of May 18, 1905.

It was contended for the defendant in the Court below that the only authorization in the Jurisdictional Act was to ascertain whether or not the Cherokee Nation was entitled to interest on the judgment of the Court in the former case, in addition to that which already had been paid, and that the direction in the Act to examine specially the agreement of December 19, 1891, was merely that the court might determine whether or not the right rate of interest had been allowed on the judgment. It was insisted on behalf of the plaintiffs in the Court below that this Act in effect directed the Court to examine the question of interest *de novo* and to render judgment for any interest rightfully owing the Cherokees in addition to any heretofore allowed and paid under the judgment of May 18, 1905, or otherwise.

The Court below in its memorandum expressed no opinion as to the purpose of the Jurisdictional Act, but mistakenly asserted that it was asked to construe the Jurisdictional Act as requiring it "to decide the case again on a different basis from its original determination" and this could not be done because the agreement of 1891 "was considered by the Supreme Court in reaching its determination as to interest" and "the law now stands as it then stood."

As we have endeavored to show, the original claim was merely to fix by judgment the amount, if any, due under treaty stipulations. The former judgment fixed

this amount. The agreement fixed whatever this amount should aggregate March 4, 1895, as the purchase price of the land and the liquidated debt of the United States, which was not then paid. This suit now asserts that interest on this amount of $4,296,527.57, which the Court below finds was the then aggregate is due under the agreement at 5% and is for this interest from that date, March 4, 1895, less whatever interest has been paid.

The basis of contention of the counsel for the United States in the Court below, that the Jurisdictional Act merely directed the Court to ascertain if there was any further interest due upon the judgment, rests upon the authorization in the Act to pay interest "on the funds arising from the judgment," and it was insisted that this authorization is identical with a direction to pay "interest on the judgment." In order to arrive at the construction that the court is directed merely to ascertain if there is any further interest due on the judgment, all of the provisions of the Jurisdictional Act, except the phrase "interest * * * on the funds arising from the judgment" must be ignored. Consideration of the whole Jurisdictional Act utterly destroys this construction.

The laws, treaties and agreements which the act directs this court to carefully examine, and if under which any further interest is found to be rightfully owing, to render judgment therefor, were in force long prior to the judgment of the court and provided for interest on the several funds due as the purchase price of the Cherokee Outlet. The Supreme Court specifically held in the original suit (202 U. S. 126) that the Treaty of 1846 provided for interest on these funds, as did the agreement of 1891. The Act further

provides that if it shall be found 'that under any of the said treaties, laws or agreements *interest on one or more of said funds, either in whole or in part, has not been paid and is rightfully owing* * * *, the court shall render judgment therefor against the United States." (Italics ours.) Surely it cannot be contended that providing for the recovery of interest due upon any one of the funds set out in said judgment is identical with providing for interest in the judgment itself. This language of the statute alone fully answers the argument of counsel for the defendant below, and the answer to the argument is overwhelming. To give to the act the construction contended for by counsel of the defendant convicts Congress of a false statement of facts. The several funds did not originate out of the judgment but in the laws, treaties and agreements to which the act refers.

The term "funds arising from the judgment" seems to have first occurred in the order of the Court of Claims January 19, 1909 (Ref. Ct. Cl. Docket), where the court directed its clerk to request the Secretary of the Treasury to take such action as might be necessary to secure from Congress such additional appropriation as should carry into effect the judgment of the court "including interest at 5 per cent per annum *on the fund arising from Item 2 of said judgment from June 12, 1838,* up to the date of the final approval of the roll of individual beneficiaries entitled to share in the fund."

Certainly the court in this order did not use the term "funds arising from Item 2 of said judgment" as identical with the judgment itself, because the judgment could by no possibility have borne interest from June 12, 1838. Congress in the Jurisdictional Act

merely adopted the description of these funds used in the order of the court, and the whole case for the defendant rests upon the obviously improper use of the preposition "from" for the preposition "in." If the court had used the phrase "Funds arising *in* Item two of said judgment" there would not have been the slightest basis for the contention of counsel for the defendant, for Congress would have adopted the same language. It is perfectly clear that this is what the order of the court meant. Webster's International Dictionary gives the following definition of the word "arise:"

> "To spring up; to come into action, being or notice; to become operative, sensible or visible; to present itself."

In the light of this definition and the commonplace every day use in lawsuits of the word "arise," it is clear that in the order of the court the term "arising from" was used in the sense of "arising in," or "coming into notice," or "presenting itself" in the judgment.

> THE APPELLANT IS ENTITLED TO RECOVER INTEREST FROM MARCH 4, 1895, AS FOLLOWS:
>
> ON THE SUM OF $10,202.06, THE AGGREGATE OF PRINCIPAL AND INTEREST OF ITEM 1 AS AN INTEREST BEARING TRUST FUND UNDER TREATIES OF 1819, 1835 (ART. 10), AND 1866 (ART. 23);
>
> ON THE SUM OF $4,263,320.28, THE AGGREGATE OF PRINCIPAL AND INTEREST OF ITEM 2, AS AN INTEREST BEARING TRUST FUND UNDER THE TREATY OF AUGUST 6, 1846 (ART. 11), AND THE FINDING OF THE SENATE ON SEPTEMBER 5, 1850 (SEN. JOURNAL 31 CONGRESS 1 SES. 602);

ON THE SUM OF $889.90, THE AGGREGATE OF PRINCIPAL AND INTEREST OF ITEM 3, AS AN INTEREST BEARING TRUST FUND UNDER TREATIES OF 1835 (ART. 10), AND 1866 (ART. 23);

ON THE SUM OF $22,115.27, THE AGGREGATE OF PRINCIPAL AND INTEREST OF ITEM 4, AS AN INTEREST BEARING TRUST FUND UNDER TREATIES OF 1835 (ART. 10), AND 1866 (ART. 23).

AND

THE PLAINTIFF IS ENTITLED TO RECOVER INTEREST UNDER THE ACT OF SEPTEMBER 11, 1841, AND THE TREATY OF JULY 19, 1866, ON THE SUM OF $4,296,527.57 DUE AND PAYABLE TO THE PLAINTIFF MARCH 4, 1895, SAID SUM BEING THE AGGREGATE OF PRINCIPAL AND INTEREST OF THE SEVERAL ITEMS, 1, 2, 3, AND 4, AS INTEREST BEARING TRUST FUNDS.

The Court below in its opinion says:

"The court is now asked to consider the agreement of December 19, 1891, as a hard and fast contract to apply a five per cent rate to all of the items found due on March 4, 1895. In order to do this the court is asked to find that the five per cent interest promised by the Government to the Cherokees in paragraph 6 of the agreement of 1891, 'so long as the money or any part' remained in the Treasury, related to the money found due in the Slade and Bender account, as well as to the cash payment of $8,595,736.12—a matter open to doubt with the weight of reason against such construction. The Court is asked further to find that the failure of Congress to appropriate the payment of principal and interest called for by the Slade and Bender account amounted to a breach of contract that rendered the United States liable for the whole amount, principal and interest; and this, too, in the face of the proviso in the sixth paragraph of the agreement of 1891, 'that nothing

> contained in this agreement shall have the effect to limit or impair any rights whatever the Cherokee Nation has in or to or over the lands herein ceded until it shall be so ratified by Congress; And provided further, That if this agreement shall not be ratified by Congress, and the appropriation of money, as herein provided for, made on or before March 4, 1893, it shall be utterly void.' "

In response to the suggestion of the Court below that they are asked to consider the agreement of December 19, 1891, as a hard and fast contract to apply a 5 per cent rate to all the items found due on March 4, 1895, the attention of the Court is invited to the opinion of the Court in the original case (202 U. S. 126), where it is said:

> "The question of interest was a 'subject of difference while the negotiations were being carried on, the determination of which was provided for in the treaty itself' in 1846, and in the '*agreement itself' in 1891,* and is the same in principle as in the case of the Old Settlers."

The only interest which was in dispute in the original case was whether or not any interest was due on the four funds set out in the Slade and Bender Account. The cash payment of $8,595,736.12 to which alone the interest provision of paragraph 6 is held by the Court below to apply, was not under consideration in the original case. Therefore, the statement of this court in the original case, as one of the reasons for allowing interest on these four funds, that the agreement itself provided for interest, would seem conclusively to clear up the doubt which the Court below expressed, saying the weight of reason was against

the conclusion that this interest paragraph related to any money except the cash payment. Subsequently, in its opinion the Court below resolved this doubt against the appellant by saying that the ratification of the agreement by Congress, the payment of part of the purchase price and the authorization to contract for the payment of the balance thereof, together with the appropriation made to employ experts to render complete account of moneys due the Nation by the United States clearly showed that the 5 per cent interest did not relate to the money due under the Slade and Bender account. We have been unable to follow the reason of the Court in this particular, and cannot possibly conceive how the ratification of the agreement or the payment of the cash purchase price in any way absolved the United States from paying interest on the remainder of the purchase money. We regard the finding of this Court in the original case that the agreement itself provided for interest, and the only interest mentioned in the agreement is 5 per cent on the money so long as it remains in the Treasury, is conclusive of the obligation of the Government to pay interest on the whole of the purchase price of the land, if it has not done so. The Court below says that it was asked to find that the failure of Congress to appropriate the payment of principal and interest called for by the Slade and Bender account amounted to a breach of contract that rendered the United States liable for the whole amount, principal and interest. We again invite the attention of the Court to its language in the original case heretofore quoted herein (202 U. S., p. 123),

> "The Cherokee Nation has parted with the land, has lost the time within which it might have

> appealed to the Courts, and has lost the right to bring the items which it regards as incorrectly or unjustly disallowed to judicial arbitrament, *and the United States are placed in the position of having broken and evaded the letter and spirit of their agreement.*" (Italics ours.)

We further quote the Court from the opinion in the original case, at p. 121:

> "* * * The Cherokee Nation had the right to immediate payment and the agreement intended to secure to them the next thing to it—the right to an early payment. The accounting was merely a means to an end. The end was the immediate payment, as near as might be, of the whole consideration to be given for the cession of the Outlet. When the cession was made the purchase money was due; the only thing remaining, which was the object of the accounting, was to ascertain the exact amount. This was not the case of a party prosecuting an unliquidated debt, but the case of sale and delivery and non-payment of the purchase money for the thing sold and delivered. * * * Nothing was left to the ordinary uncertainties and procrastinations of legislation, and no agreement could have been made to pay promptly more unequivocal and specific. Time was of the essence of the contract so far as the words of the parties could make it."

It is manifest that had the United States kept its agreement, the whole purchase price, principal and interest, on March 4, 1895, to-wit, $4,296,527.57, would on that date have been paid to the Indians or placed in the Treasury for their benefit, and so long as that money remained in the Treasury, if the opinion of the Court in the former case means anything, the In-

dians would have been entitled to interest at 5 per cent thereon. As it was, the United States kept both the land and the money and have never settled with the Indians according to their promises and agreements. We insist that the high purpose of the Jurisdictional Act is to carry out to the fullest the solemn agreement of the United States.

Further than this, all of the funds set out in the four items in the judgment of the Court of Claims, are trust funds in the hands of the United States for the benefit of the Cherokees, and bear interest at five per cent. The judgment of the Court of Claims specifically designated Items 1 and 4 as trust funds to be held by the United States as trustees. Item 3, amounting to $432.28 principal was a part of the proceeds of the sale of lands and were trust funds under treaty of 1866, Art. 23, while Item 2 was to be held by the Secretary of the Interior for certain specific purposes.

But Item 2, was taken from the $5,000,000 interest bearing treaty fund, and when restored thereto it becomes a trust fund in the hands of the United States, bearing a rate of interest not less than five per centum per annum. Furthermore, when Congress appropriated money for the payment of the judgment in the former case, it expressly provided for the payment of "such additional sum as may be necessary to pay interest as authorized by law" (34 Stat. 664, *supra*). The interest as authorized by law should have been computed and paid is that provided in the said agreement of December 19, 1891, ratified by the Act of March 3, 1893.

Finally, it must be presumed that Congress intended to provide for the complete and full determina-

tion of the plaintiff's claim for interest. It had, and could have, no good reason for making a distinction between interest (if unpaid) accruing before and that accruing after the judgment. If the United States under its agreement with the plaintiff is indebted to it, the debt should be paid. It would be bad morals, to say the least, for the United States to refuse to pay such a debt, and no construction of the Jurisdictional Act which accomplishes this immoral purpose is permissible if a construction more consonant with justice and fair dealing is tenable. If we assume that the United States does owe the plaintiff interest which accrued prior to the judgment, then a construction of the Jurisdictional Act which permits the Court to authorize its payment is thoroughly consonant with fair dealings. Certainly the United States is placed at no disadvantage by an inquiry, if in fact no such interest is due. On the other hand, if interest accruing prior to the judgment is rightfully owing to these Indians, it must be presumed in the absence of any compelling reason to the contrary that Congress intended that the amount thereof should be ascertained and paid.

III.

In Any Event the Court is Authorized to Render Final Judgment for Any Interest Arising Since Said Judgment of May 18, 1905.

We think it has been very clearly demonstrated that the Jurisdictional Act authorizes this Court to examine the question of the interest paid on the four distinct funds set out in the judgment of May 18, 1895, and in addition to any such interest paid, to go behind this judgment and allow any other interest on any one

or more of these funds, if under the laws, treaties and agreements between the United States and the Cherokee Nation, such interest is rightfully owing. As before said, the defendant in the Court below asserted that the Jurisdictional Act merely referred to the Court the question of whether the right interest had been computed on the judgment. In pointing out that even under this theory of the scope of the Jurisdictional Act there is a material balance due to the plaintiff, we in no way recede from the contention that Congress had authorized the whole question of interest to be reopened and reexamined, and the payment of any interest rightfully owing under the appropriate laws, treaties and agreements and especially of the agreement of December 18, 1891.

The prayer of the petition asks judgment not only for interest calculated on the theory that the plaintiff is entitled to interest as 5 per cent from March 4, 1895, on the aggregate principal and interest then due, but "for such additional and other sums as may be necessary to pay for further or any other interest authorized by law." (R. p. 10) The appellant asserts that at the date of the judgment, May 18, 1905, the aggregate of the principal and interest then due was an interest bearing fund in the Treasury of the United States which bore interest at the rate of 5 per cent as provided in the agreement of 1891, and the Act of March 3, 1893 ratifying it. We do not contend that the judgment as such bore interest at 5 per cent, but that the aggregate of the principal and interest found due on the date of the judgment was a fund coming within the statutes, treaties and agreements between the United States and the Cherokee Nation, which pro-

vided, as held in the original suit (202 U. S. 126) for interest at 5 per cent.

At the date of the judgment the principle and interest on the four items therein set out aggregated $4,865,002.34, and upon this sum the appellant is entitled to interest at 5 per cent until the same shall be fully paid. For the convenience of the Court we submit a statement of the amounts due the Cherokee people, based upon the contention that they are entitled to 5 per cent interest on the aggregate of the principal and interest due on the date of judgment, to-wit, May 18, 1905, computed according to the accepted rule of partial payments with interest on each item computed to the date of the last payment.

Account of Item 1. The sum of.....	$1,609.02
With interest thereon at 5% per annum from Aug. 8, 1919, until paid.	
Account of Item 2. The sum of.....	798,875 36
With interest thereon at 5% per annum from March 15, 1910, until paid.	
Account of Item 3. The sum of.....	1,110.42
With interest thereon at 5% per annum from May 18, 1905, until paid; less $34.25 paid attorneys November 3, 1906.	
Account of Item 4. The sum of.....	2,346.52
With interest thereon at 5% per annum from Aug. 8, 1919, until paid.	

In the Court below the only scope and purpose attributed to the jurisdictional act by Counsel for the United States was that the Court might determine if any interest due under the judgment is due and unpaid, and that the direction to especially examine the agreement of 1891 was in order that it might be determined whether the right rate of interest had been

computed on the judgment itself. Even under this narrow and not-to-be-sustained view of the act, it is apparent that the court is authorized to examine all the laws and statutes and agreements "in any manner affecting or relating to the question of interest *on said funds* " (not on said judgment). This authorizes the court to determine as well whether interest has been computed on the proper principal, as at the proper rate, or from the right date. Under this language, surely the court has as much power to determine whether the proper principal as set out in the agreement was used in computing interest, as it may have to determine whether the right rate was used in the computation.

We submit that at least after the judgment that these funds had been improperly withdrawn (and misappropriated) from the trust funds held by the United States for the Indians, the interest as well as the principal was restored to the fund from which it was taken, and so long as it remained in the treasury the appellant is entitled to interest thereon at five per cent. In this connection, we again invite the attention of the court to the fact that by the Act of June 30, 1906 (34 Stat. 634, 664) Congress after appropriating to pay the judgment of the Court of Claims, also appropriated "such additional sum as may be necessary to pay interest, as authorized by law". On May. 13, 1907, the Court of Claims entered an order authorizing the Secretary of the Treasury to deposit at interest the funds due the Eastern Cherokee. This order was certified to the Secretary of the Treasury May 14, 1907, but the Secretary denied his authority to thus dispose of the funds. On January 19, 1909, the Court of

Claims entered an order in the cause requesting the Secretary to secure from Congress such additional legislation as shall "carry into effect the judgment of the Court of Claims entered in said cause, as aforesaid, including interest thereon at 5 per cent per annum on the fund arising from Item 2 of said judgment ($1,111,284.70) in favor of said Eastern Cherokees from June 12, 1838, up to the date of the final approval by the Court of the rolls of the individual beneficiaries entitled to share in said fund". Thus the Court of Claims called upon the Secretary of the Treasury to see that interest on the judgment at five per cent per annum should be paid until the final approval of the roll, so far as item 2 thereof was concerned. This accords with the prior action of the Court in authorizing the Secretary to cover these funds into an interest-bearing deposit. In response to this Congress passed the Act of March. 4, 1909, (35 Stat. 338-9) providing that the act of June 30, 1906, in

> "so far as the same provides for the payment of item two of the judgment of the Court of Claims of May 18, 1905, in favor of the Eastern Cherokees, shall be so construed as to carry interest on said item two up to such time as the roll of the individual beneficiaries entitled to share in said judgment shall be finally approved by the Court of Claims, and for the payment of said interest a sufficient sum is hereby appropriated."

CONCLUSION.

For the reasons stated the judgment of the Court of Claims should be reversed and judgment rendered for the appellant for the balance due the plaintiff of $2,216,091.76, with interest thereon at five per cent

from March 15, 1910, until paid, less $23,688.18 (interest payments of August 7, 1919, under Act of June 30, 1919); or, in the alternative, that the Court of Claims be directed to enter up judgment for the appellant for interest at five per cent upon the aggregate of the principal and interest due May 18, 1905, less the proper credits thereon as shown in its findings of fact.

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Of Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1925

No. 198

THE CHEROKEE NATION, *Appellant*,
vs.
THE UNITED STATES, *Appellee*

APPEAL FROM THE COURT OF CLAIMS

REPLY BRIEF

To clarify the questions involved and correct an evident misunderstanding on part of counsel for the appellee, the Court's attention is respectfully invited to the following reply brief.

Attached hereto is the Appendix referred to on page 3 of the Cherokee's original brief and attention is respectfully invited to the Statement of Facts in Detail given therein. In it will be found rather complete quotations from the Statement of Facts and

the Opinions of the Courts in the former case. (Cherokee Nation vs. The United States, 40 Ct. Cls., 252; 202 U. S. 101) together with references to the respective questions involved in the instant case.

The appellee has frankly receded from the position taken in the Court of Claims that the questions presented in this case are *res-judicata,* and that Congress is powerless to waive the defense of a former adjudication. Since the greater portion of the brief filed on behalf of the Appellant was necessarily devoted to a full discussion of these questions now abandoned by the appellee, we deem it well to submit a reply to the particular contentions now submitted in behalf of the appellee.

On page 2 appellee's brief states that the question involved is whether the United States should pay the Cherokee Nation compound interest on certain obligations. This is repeated on page 29. From this it is evident that the appellee does not understand the question involved as contended by the Cherokees.

The question is not whether the Government should pay the Cherokees compound interest on certain obligations but whether it should comply with its agreement of 1891, to pay simple interest at 5% on a liquidated amount which it is admitted was due and payable March 4, 1895, as a part of the purchase price of lands bought from the Cherokees. The non-payment of this debt, March 4, 1895, from which date interest is asked, the Court of Claims has held, affirmed by this court, constituted a breach of contract and of good faith with the Indians. (202 U. S. at p. 122.)

In addition to the agreement of 1891, the respective liquidated items of the Slade and Bender account were

trust funds, under express trusts, in the hands of a trustee, which the courts held had been liquidated and admitted by the trustee to be due. Interest on these whole amounts as restored trust funds is due.

On page 3 Appellee's brief says:

> "The correctness of the judgment of 1905 is being re-examined here under an authority of an Act of Congress."

Here again it appears that the Appellee misunderstands the contention of the Cherokees.

The correctness of the judgment of 1905 is not being re-examined here. The contention of the Cherokees is that that judgment was correct so far as it went, but it was limited under the jurisdictional act and was only for the amounts due under treaty stipulations.

That jurisdictional act limited the court's jurisdiction to a determination of the amounts due "under treaty stipulations." The present jurisdictional act directs the court to consider and examine treaties, and agreements, "and especially the Agreement of 1891," as relating to interest, and to determine what, if any, additional interest is due.

APPELLEE'S PROPOSITIONS

As we understand the contentions submitted by the United States, they are:

I. That the "obligation" of the United States under the agreement of 1891 was to pay on or before March 4, 1895, the principal items mentioned in the Slade and Bender report with simple interest from the dates the liabilities arose *until payment of the principal sums.* (Italics ours.) (Brief for Appellee, p. 25.)

II. That default in the payment March 4, 1895, does not authorize the payment of compound interest. (Brief for Appellee, p. 29.)

III. That the Appellant has been paid all the interest due on the judgment of May 18, 1905. (Brief for Appellee, p. 36.)

We shall discuss these propositions in their order.

I

THE OBLIGATIONS OF THE UNITED STATES UNDER THE AGREEMENT

Counsel for the United States have confused the obligations of the agreement of 1891 with the obligations under "treaty stipulations." The obligation under treaty stipulations was to pay the principals of the four items, with interest from the dates of their origin *until payment of the principals.* The obligation under the agreement was to pay both the principals and interests on a day certain, March 4, 1895, for land sold. This agreement created a new debt. This new debt was the "whole consideration" for the purchase of the Outlet, and consisted of two money items, (1) the principals and interests due March 4, 1895 (aggregating $4,296,527.57); (2) $1.25 per acre, or $8,595,736.12. This Court held in the former case, in unmistakable language, that the obligation to pay this amount, $4,296,527.57, March 4, 1895, was "a liquidated debt;" that there was to be "immediate payment as near as might be, of the whole consideration;" that "time was of the essence of the contract" and in not paying the debt March 4, 1895, "the United States are placed in the position of having broken the letter and spirit of their agreement."

In stating the "obligation" of the agreement of 1891, counsel for the United States, in order to break the compelling force of this language of the Court, have added to the obligation of the agreement, the interest obligation under the treaties, and thus argue that the agreement but continued the interest on the principals in the treaty obligations. If "time was of the essence of the contract," and if the amount of $4,296,527.57 due March 4, 1895, was a part of the "whole consideration" for the sale of the land, thus creating a new debt for a new consideration the argument falls of its own weight.

If the interest due the appellant is to be computed under "treaty stipulations," it has been correctly computed. If it is to be computed under the obligation of the agreement of 1891, the United States still owes the appellant the amount set out in Finding X of the Court of Claims. This will be further briefly discussed under the next proposition.

II

COMPOUND INTEREST

Counsel for the United States say (Brief for Appellee, pp. 30-31):

"As between private individuals, a default by one in a promise to pay to the other a principal sum, with interest thereon until the principal sum is paid, does not result in compounding interest or in creating a new principal as of the date of default, on which interest is to be computed. Compounding interest is generally forbidden, and the only common exception is in the case of interest coupons. No principle or rule of

law has been pointed out by the appellants which justifies the compounding of interest as a result of and on the date of default."

Again, Counsel for the United States have confused the obligation of the Agreement of 1891, with the obligation under "treaty stipulations." The promise in the agreement, is not to pay the principal sum, *with interest thereon until the principal sum is paid*, but it is to pay the principal and interest *March 4, 1895* (the interest then being nearly three times the principal) in consideration for the sale and cession of the more than eight million acres of land. The default in this case is in the payment of the purchase price, the new debt. This purchase price was then due, and the interest claimed by the appellant is not compound interest upon the original amounts due under treaty stipulations, but simple interest upon the purchase price of the Outlet. The contract was to pay this whole consideration, $4,296,527.57, March 4, 1895. The "spirit and letter" of the contract was broken by the United States. "Where there is a contract to pay money on a day fixed, and the contract is broken, interest, as a general rule is allowed." *Aurora City v. West. 7, Wall. 82,105.* This is the rule, even though the contract is to pay interest on a day fixed, and is exemplified in the cases of interest coupons. *Pana v. Bowler,* 107 U. S. 529, 546.

INTEREST AS PROVIDED IN THE AGREEMENT

The United States concedes that it promised to pay the principals and interests March 4, 1895. The Court below finds that this then aggregated the sum of $4,-

296,527.57. This court has held that this sum was a part of the whole consideration for the purchase and sale of the Outlet, which should have been then paid, but was not paid. If it had been then paid, the Cherokees would have had the money in possession. But under the agreement, the United States could retain this money in its Treasury, and pay 5% interest thereon, or it could avoid the interest by paying the money.

It is insisted, however, that the provision in the sixth paragraph of the agreement for the payment of interest did not refer to the whole purchase price, but only to the $1.25 per acre, or $8,595,736.12 to be paid before the accounting of the amounts due under treaty stipulations was made.

Let us examine the sixth paragraph to see if there was an agreement that although the United States might retain in its Treasury all of the purchase price, only a part thereof was to bear interest. The language of the paragraph pertinent to the issue is as follows:

> Sixth. That *in addition to the foregoing enumerated considerations* * * * the United States shall pay to the Cherokee Nation * * * $8,595,736.12 * * *.
>
> So long as the money or any part of it shall remain in the Treasury after this agreement shall become effective such sum so left * * * shall bear interest at 5% per annum, payable semi-annually.

The agreement further provided that the United States could terminate liability for interest in whole or in part by paying in whole or in part the amounts due.

What was "the foregoing enumerated considerations" set out in the sixth paragraph along with the interest provision? It was that the United States should pay as nearly immediately as possible the balance of the money found due upon a proper accounting. Stripped to the bone, and substituting the exact figures and the definite date, the provision would read as follows:

> Sixth. That in addition to the foregoing enumerated considerations of $4,296,527.57, to be paid March 4, 1895 * * * the United States shall pay to the Cherokee Nation * * * $8,595,736.12. So long as the money or any part of it shall remain in the Treasury * * * it shall bear interest at 5% per annum payable semi-annually.

The United States contends that the interest provision is limited to only part of the purchase price, and that if the $4,296,527.57 had been on March 4, 1895, covered into the Treasury, and retained there no interest would have been recoverable thereon under the agreement. To state the contention is to answer it. Among the "foregoing enumerated considerations" set out in the paragraph, was a money consideration, just as the rest of the consideration was a money consideration, and clearly if the Cherokees had agreed that part of the money consideration, so long as retained by the United States, should bear interest and the other should not, the contract would have used appropriate language to that effect. Certainly the language cannot be construed more strongly against the wards of the government than against the government.

It seems to be conceded by Government Counsel, as also determined by the Court of Claims, that at least the meaning of the expression "the money" as used in the 6th paragraph of the agreement of 1891 is doubtful. If this is the correct view then we submit that this court has for more than one hundred years followed the principle that when the terms of a treaty with an Indian tribe is of doubtful meaning that such doubt should be resolved in favor of the tribe. Worcester v. Georgia, 6 Pet. 515, U. S. v. Choctaw Nation, 179 U. S., 494, The Kansas Indians, 5 Wall. 137, U. S. v. Kagama, 118 U. S. 375, Choctaw Nation v. U. S. 119 U. S. 1, Jones v. Meehan, 175 U. S. 1.

In the original action, it was held by this court and the Court of Claims that each of these several items were, under the treaties creating them, interest bearing funds at the rate of 5% per annum. It was also held by this court and the Court of Claims that these respective amounts composed of principals and interests became due and payable March 4, 1895.

Furthermore it is perfectly clear that the Cherokees are not only entitled to recover interest on these several trust funds separately, under the treaties creating them, but that under the general treaty of July 19, 1866 (14 Stat. L. 799) and the act of Congress of September 11, 1841, and Senate Resolution of September 30, 1850 (Sen. Journal 31st Congress 1st Session, p. 602) (5 Stat. L. 465) they would also be entitled to recover interest on the aggregate of each of these, principal and interest at the rate of 5% from March 4, 1895. This would give exactly the same amount as if interest were allowed on the aggregate of the respective items.

Article 23 of the Treaty of July 19, 1866, provides that:

> "All funds now due the nation, or that may hereafter accrue from the sale of their lands by the United States, as hereinbefore provided for, shall be invested in United States registered stocks at their current value, and the interest on all said funds shall be paid semi-annually on the order of the Cherokee Nation." (14 Stat. L. 799.)

Section 3959 of the Revised Statutes of 1871, is re-enacting Section 2 of the Act of Congress of September 11, 1841 (5 Stat. L. 465), provides that:

> "All funds held in trust by the United States, and the annual interest accruing thereon, when not otherwise required by treaty, shall be invested in stocks of the United States, bearing a rate of interest not less than five per centum per annum."

Regardless, however, of specific treaty provisions which are full and clear in establishing these funds as original interest bearing trust funds, it cannot be controverted that the United States were holding these funds in trust and misappropriated some of these funds. These funds were bearing interest. When the United States promised and agreed to pay back these misappropriated sums with the past due interest thereon March 4, 1895, as the purchase price of the Indians' baronial empire, with the option to retain these moneys in the Treasury, then such moneys were, or should have been, in the absence of payment, restored to the interest bearing trust funds from which the Indian's guardian misappropriated them.

As part answer to this contention it is claimed that the money was not actually paid into the Treasury as required by the statutes. In response to which it is respectfully submitted that it does not lie in the mouth of this appellee to claim the advantages of its own wrong, besides it is a familiar rule of Equity that Equity considers that as done which ought to have been done and therefore that the purchase money was potentially in the Treasury of the United States as a trust fund and ought to be treated as if invested for the benefit of the Indians at 5% interest under Rev. Stat., secs. 2095, 2096 and 3659, Comp. Stat. secs. 4073, 4074, 6667, 3 Fed. Stat. Anno. 2d. ed., p. 774, 8 Fed. Stat. Anno. 2d ed. p. 910; or, in the alternative, that the assumption by the United States of title to the land without compliance with the concurrent condition of payment to the Indians and its sale by the United States to settlers was a breach of trust, requiring the

On page 30, appellee's brief refers to the fact that the Slade and Bender account, prepared in accordance with the Agreement, shows certain principal items due the Cherokee Nation together with interest thereon from the dates the liabilities arose, "to date of payment," and says this statement was accepted and agreed to by the Cherokee Nation and thus defined the obligation of the United States. This does not change the obligation of the United States to pay the liquidated amounts of the account, principals and interest, as found by this court, not later than March 4, 1895, which sum the Court of Claims found amounted to $4,296,527.57 (R. 17), the purchase price of land sold.

The reason the account was stated in the manner referred to, was because the account was rendered before the date of payment could have been ascertained

and it was necessary to insert therein the words "until date of payment." The appellee's accountants could hardly be expected to incorporate in their report a provision which would, in advance, imply a breach of the contract and of the good faith of the appellee, which this court and the Court of Claims have held subsequently occurred.

III

INTEREST ON THE JUDGMENT OF MAY 18, 1905

The appellant never asserted that it was entitled to interest on the judgment of the Court of Claims, as interest on a judgment. This alternative proposition was submitted because of the earnest insistence of the United States in the Court of Claims that the Court was authorized to determine merely whether any interestest accruing after the judgment was due and unpaid. We insisted that even upon this basis, applying the terms of the agreement of 1891 to the judgment, the aggregate of the principals and interests due after the judgment should be treated as money in the Treasury of the United States which under the Agreement of 1891 should bear interest at 5%. However, since it is conceded that the Court has the power and authority, under the jurisdictional act, to go behind the judgment of March 18, 1905, and to determine whether or not the proper principals have been used in computing the interest under the agreement, from March 4, 1895, this alternative proposition ceases to be a matter of interest or inquiry. If our contention is right that the opinion in the former case forecloses the proposition that a new debt was created by the agreement, and that there was a promise to pay the $4,296,527.57,

March 4, 1895, but that the United States having elected to retain the money in the Treasury and not to pay, are abligated to pay interest thereon at 5%, it becomes unnecessary to determine the right to interest on the whole of the judgment, principal and interest, since in each case the right to interest is bottomed upon the provisions of the agreement of 1891.

CONCLUSION

In conclusion, we desire again to state that we are not asking for compound interest upon the debts due under treaty stipulations. We are suing upon the agreement of 1891 wherein appellee contracted to pay the Indians $4,296,527.57 March 4, 1895, for land sold and delivered or to retain the sum for them in the Treasury at 5% interest until fully paid. This is a claim for simple interest upon this debt. It is founded in contract to which the good faith of the United States is pledged. It is just. It is legal. It is fair. It should be paid.

Respectfully submitted,

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APPENDIX

The court's attention is respectfully invited to the Statement of Facts in Detail given below wherein there will be found rather complete quotations from the Statement of Facts and the opinions of the Courts in the former case (Cherokee Nation v. U. S., 40 Ct. Cl. 252, 202 U. S. 101) together with references to the respective questions involved in the instant case. It is believed that this appendix may prove helpful in saving time and effort and in arriving at a clear understanding of the case.

STATEMENT OF FACTS IN DETAIL

The facts underlying this suit are largely set forth in the findings of fact and the opinions of the courts in the case of the Cherokee Nation vs. United States, 40 Ct. Cls., 252, sustained by this Court in 202 U. S. 101. As the present suit is to a great extent based upon the findings of fact and the conclusions of law announced in that case by the Court of Claims and this Court, for the purpose of saving the Court as much labor as possible, the facts herein set forth will to a considerable extent be taken therefrom. This is made all the more necessary because the Court below held that the questions in the instant case are identical with those considered and decided in the former case. The facts as stated herein include the facts set forth in the allegations of the amended petition.

Prior to the year 1808, the Cherokee Nation of Indians was domiciled in Georgia, Alabama, Tennessee, North Carolina and South Carolina where they owned and possessed about fourteen million acres of land. In that year, duly authorized deputations came to

Washington to make known the desire of about two-thirds of the Nation to engage in the pursuits of agriculture and civilized life in the country which they then occupied to the end that they might more readily begin the establishment of fixed laws and a regular government, and also that about one-third of the Nation, owing to the scarcity of game, wished to remove to the vacant lands across the Mississippi River. (40 C. Cl. 255.)

ITEM 1 OF THE SLADE AND BENDER ACCOUNT

The Cherokees proceeded with the development of a system for the establishment of schools and they claimed that the United States had failed to add to the school fund the proceeds from seventeen hundred acres of land at $1.25 per acre, amounting to $2,125.00, growing out of the Treaty of February 27, 1819. (40 C. Cl. 295.)

This constitutes item 1 of the Slade and Bender account (R. 19) referred to in the findings of the Court of Claims and was a part of the Cherokee school fund which was made an interest bearing fund by article 4 of the treaty of 1819. (7 Stat. 195.)

"Subsequent to the Treaty of 1828 and prior to the signing of the Treaty of December 29, 1835, almost continuous efforts had been made to induce the Cherokee people, East, to remove to the Indian Territory, but without success." (40 C. Cl. 268.)

TREATY OF NEW ECHOTA

"On December 29, 1835, a treaty was drawn up between the United States and purported

"chiefs, head men and people of the Cherokee Tribe of Indians," which treaty is commonly called "the Treaty of New Echota." (40 C. Cl. 265.)

"Neither the Western Cherokees" or "old settlers" nor the great body of "Eastern Cherokees" were parties to this treaty and they at all times up to the making of the treaty of 1846 repudiated it on the ground that its execution had not been authorized by them or their representatives in council." (40 C. Cl. 265.)

They protested against it through their constituted authorities on numerous occasions and refused to give it any recognition; declared it to be unauthorized by the Cherokee people and a fraud on the United States. (40 C. Cl. 269.)

"The Cherokees having made no preparation to remove, as required by the terms of the Treaty of 1835, Gen. Winfield Scott, with an army of men, in May, 1838, placed them in camps of concentration under military control, preparatory to their removal by force." (40 C. Cl. 269.)

"In pursuance thereof, 18,026 Cherokees were removed to the Indian Territory." (40 C. Cl. 280.)

ITEM 2 OF THE SLADE AND BENDER ACCOUNT

The Government charged to the Cherokees a large sum for the expenses of this removal of the Eastern Cherokees to the Indian Territory. (40 C. Cl. 296.)

The exact amount was later ascertained to be $1,111,284.70 which was improperly charged to "The Five Million Dollar Fund" which constituted the purchase price paid by the United States for the lands of

the Cherokees east of the Mississippi River. It was also known as "The Treaty Fund." The Cherokees bitterly resented this misappropriation of their funds. It brought about a critical condition which resulted in the treaty of August 6, 1846. (27 C. Cl. 5; 36-7.) The Cherokees understood that this last treaty (1846), made clear the obligation of the United States to pay the expenses of the removal of the Eastern Cherokees, but the officials of the United States still contended that the United States were not so obligated. (40 C. Cl. 282.)

The question remained open and resulted in a sore controversy, until it was finally settled by the decision of the Court of Claims, March 20, 1905, and of this Court April 30, 1906, in the case of the Cherokee Nation v. the United States. (40 C. Cl. 252, 202 U. S. 101.)

This constitutes item 2 of the Slade and Bender account (R. 19) hereinafter referred to and was a part of the money to be paid as the purchase price of the lands of the Eastern Cherokees, known as the Outlet. Consider that as a matter of fact, fully evidenced by history, treaties and the Government public records, the lands sold in 1891 to the United States (more than 8,000,000 acres) included nearly three million acres of the Cherokee "Home Lands."

This amount of $1,111,287.70 was held to be an interest bearing fund by the Senate of the United States acting as umpire (Sen. Journal 31st Cong., 1st Sess., p. 602) (9 Stat. 556) and was in the hands of the U. S. as trustee for certain express purposes, *i.* e., payment to the cestui qui trusts, the Cherokees, and to bear interest at 5% until so paid. It was also held to be an interest bearing fund by this Court which said:

"Congress on September 30, 1850, in appropriating the amount of the per capita, then conceded to be due the Old Settlers, provided:

'That interest be allowed and paid upon the above sums due respectively to the Cherokees and "Old Settlers," in pursuance of the above-mentioned award of the Senate, under the reference contained in the said 11th Article of the Treaty of sixth August, eighteen hundred and forty-six. (9 Stat. 556.)

THE QUESTION OF INTEREST

"The question of interest was a 'subject of difference while the negotiations were being carried on, the determination of which was provided for in the treaty itself' in 1846, and in the 'agreement itself' in 1891, and is the same in principle as in the case of the Old Settlers." (202 U. S. 126.)

WESTERN LANDS OF CHEROKEES

The lands to which the Cherokees were removed are described in the treaty of May 6, 1828, as follows:

"ART. 2. The United States agree to possess the Cherokees and to guarantee it to them forever, and that guarantee is hereby solemnly pledged, of seven millions of acres of land," as therein set forth, and "in addition to the seven millions of acres thus provided for, and bounded, the United States further guarantee to the Cherokee Nation a perpetual outlet west, and a free and unmolested use of all the country lying west of the western boundary of the above-described limits, and as far west as the sovereignty of the United States and their right of soil extend." (7 stat. 311.)

The first tract referred to consisting of seven million acres was commonly known as the "Home Tract."

The second tract consisted of the lands lying west of the western boundary of the seven million acres or "Home Tract" and was commonly known as the "Outlet."

HISTORY OF AGREEMENT OF 1891

The Government became very anxious to acquire this outlet together with about 3,000,000 acres of the "Home Tract" and began negotiations therefor. "It was important for the United States that the cession should be made immediately." (40 C. Cl. 323.)

This culminated in section 14 of the act of Congress of March 2, 1889 (25 Stat. 1005), by which the President was authorized to appoint commissioners to negotiate with commissioners from the Cherokees for the purchase of certain lands lying west of the 96th degree west longitude, the principal parts of which were in the "outlet." "And for the final adjustment of all questions of interest between the United States and the Cherokee Nation which are now unsettled." (R. 14) (40 C. Cl. 288.)

"At the outset of the negotiations between said commissioners for the purchase and sale of said lands, which were known as the 'Cherokee Outlet,' the commissioners on the part of the Cherokee Nation renewed their claims and contentions with respect to the balance alleged to be due to them under various treaties, and particularly their contention that the so-called 'Treaty Fund' had been improperly charged with the expense of the removal of the Eastern Cherokees to the Indian Territory, and demanded as 'a condition precedent to any agreement for the sale of the land' that some adjustment of such contentions should be made." (40 C. Cl. 288.)

"On December 19, 1891, the said commissioners entered into an agreement by article 1 of which the Cherokee Nation agreed to cede 8,144,682.91 acres, between the 96th and 100th degrees of west longitude, south of the Kansas line commonly known as the 'Cherokee outlet.' The pertinent parts of said agreement read:

"Article II. For and in consideration of the above cession and relinquishment the United States agrees:

* * * * * *

"Fourth. The United States shall, without delay, render to the Cherokee Nation, through any agent appointed by authority of the national council, a complete account of moneys due the Cherokee Nation under any of the treaties ratified in the years 1817, 1819, 1825, 1828, 1833 1835-'6, 1846, 1866, and 1868, and any laws passed by the Congress of the United States for the purpose of carrying said treaties, or any of them, into effect; * * * If it shall be found upon such accounting that any sum of money has been so withheld, the amount shall be duly appropriated by Congress, payable to the Cherokee Nation upon the order of its national council, such appropriation to be made by Congress if then in session, and if not, then at the session immediately following such accounting. * * *

"Sixth. That in addition to the foregoing enumerated considerations for the cession and relinquishment of title to the lands hereinbefore provided the United States shall pay to the Cherokee Nation, at such time and in such manner as the Cherokee national council shall determine, the sum of eight million five hundred and ninety-five thousand seven hundred and thirty-six and twelve one-hundrdeth ($8,595,736.12) dollars. * * * So long as the money or any part of it shall remain in the Treasury of the United States, after this

agreement shall have become effective, such sum so left in the Treasury of the United States shall bear interest at the rate of five per centum per annum, payable semi-annually. * * *

COMMISSIONERS WHO NEGOTIATED AGREEMENT SAY SETTLEMENT OF MATTERS IN DISPUTE MADE CONDITION PRECEDENT TO SALE OF LANDS.

"Prior to the acceptance and ratification of said agreement on the part of the United States, as aforesaid, the commissioners on behalf of the United States, as required by the law under which they were appointed, had reported to the President the making of the articles of agreement aforesaid, and by way of explanation said:

'As to the conditions of the agreement, besides the relinquishment of title upon the one part and the payment of a price in money on the other, *it is necessary to state that the settlement of the matters contained in such conditions were made a condition precedent to any agreement for the sale of the land.* (Emphasis ours.)

'The accounting provided for in the fourth subdivision of article 2 of the agreement is inserted and agreed to, because the Cherokees are compelled to accept the construction of the treaties made by the executive and administrative branches of the Government.

'Whatever that construction is, the Indian must abide by it. There is no appeal except to Congress. Without going specifically into details, the Cherokees claim that upon a just accounting upon a proper construction of the treaties named, a large sum of money,

principal and interest, will be found due them. They also desired to include lands as well as money, but they were induced to eliminate "lands" from the provision. With that eliminated the provision was agreed to, as set out. The Government has made the accounting, has kept the books, has construed the treaties. If that has been done properly, no harm can come from restating the account. If it has not been done properly, no possible reason can exist why the error should not be corrected (Sen. Ex. Doc. 56, 52nd Cong., 1st Sess., pp. 11, 12)."

Gen. Thomas J. Morgan, Commissioner of Indian Affairs, in his report to the Secretary of the Interior on February 6, 1892, referred to the matter in the same language and concluded:

"This seems to me to be a reasonable view to take of this provision, and I do not see that any valid objection could be advanced against it. * * *

ASSISTANT ATTORNEY GENERAL SAID FULL AND FINAL SETTLEMENT PROVIDED FOR

"This report of the Commissioners was, on or about February 8, 1892, referred by the Secretary of the Interior to the Assistant Attorney General for the Interior Department 'for his consideration and report upon the legality of the contract, the sufficiency of the proposed bill, and his views upon the question(s) of law relating to the subject,' and on or about February 25, 1892, said officer reported thereon, as appears in said Senate Executive Document 56, Fifty-second Congress, first session, saying among other things: * * *

'I see nothing in the stipulations herein to comment upon. It seems right and promotive of good feeling

that there should be a full and final settlement of all claims and accounts of these Indians against the United States, and I think the terms of agreement are sufficiently clear to secure such accounting.' * * *

"All of these reports were before the Congress when it accepted and ratified said articles of agreement by act of March 3, 1893 (27 Stat. L., 640) (40 C. Cl. 290 291, 292, 293).

CHEROKEE COMMISSIONERS REQUIRED THAT FINAL SETTLEMENT SHOULD BE MADE

In these negotiations,

"The Cherokee commissioners were true to their people and their fathers in demanding as a condition to the cession and as an addition to the specified consideration for the grant ($8,300,000) that all of the past treaty transactions between the United States and the Cherokee Nation should be reopened; that their demands should be reconsidered; that the moneys which might be equitably and justly due to them should be paid, and that in the final determination of these matters they should have, if they desired it, access to the judicial tribunals of the United States. These demands were acceded to by the Government of the United States, and were ratified and approved by Congress (27 Stat. L., p. 640, par. 10). They found expression in the following formal agreement:

> 'The United States shall, without delay, render to the Cherokee Nation, through any agent appointed by authority of the National Council, a complete account of moneys, due the Cherokee Nation under any of the treaties ratified in the

> years 1817, 1819, 1825, 1828, 1835-36, 1846, 1866, and 1868, and any laws passed by the Congress of the United States, for the purpose of carrying said treaties, or any of them, into effect, * * * if it shall be found upon such accounting that any sum of money has been so withheld, the amount shall be duly appropriated by Congress, payable to the Cherokee Nation, upon the order of its national council, such appropriation to be made by Congress, if then in session, and if not, then at the session immediately following such accounting.'" (40 C. Cl. 317, 318.)

The Cherokees proceeded to comply with their part of the agreement and "on May 17, 1893, a deed of cession was executed and delivered by the proper authorities of the Cherokee Nation to the United States and the first installment of the purchase money was paid to and accepted by the Cherokee Nation and the United States thereupon took possession of said lands, and thereafter disposed of the same as public lands. (R. 16.)

SLADE AND BENDER ACCOUNT

"In pursuance of the last paragraph of section 10 of the act of March 3, 1893 (27 Stat. 643), the Secretary of the Interior promptly employed two expert accountants, Messrs. James A. Slade and Joseph T. Bender, to prepare an account between the United States and the Cherokee Nation and on April 28, 1894, the said experts filed their account with the Secretary of the Interior, which reads as follows:

Under the treaty of 1819:

Value of three tracts of land containing 1,700 acres at $1.25 per acre, to be added to the principal of the "school" fund	$2,125.00
(With interest from Feb. 27, 1819, to date of payment.)	
Under treaty of 1835:	
Amount paid for removal of Eastern Cherokees to the Indian Territory, improperly charged to treaty fund...	1,111,284.70
(With interest from June 12, 1838, to date of payment.)	
Under treaty of 1866:	
Amount received by receiver of public moneys at Independence, Kans., never credited to Cherokee Nation.....	432.28
(With interest from Jan. 1, 1874, to date of payment.)	
Under act of Congress March 3, 1893:	
Interest on $15,000 of Choctaw funds applied in 1863 to relief of indigent Cherkees, said interest being improperly charged to Cherokee national fund...	20,406.25
(With interest from July 1, 1893, to date of restoration of the principal of the Cherokee funds, held in trust in lieu of investments.)	

The said account was transmitted by the Secretary of the Interior to the proper authorities of the Cherokee Nation and it was accepted by act of the National Council approved December 1, 1894. (R. 17.)

THE GREAT OBJECT OF THE CHEROKEES

The one great object of the Cherokees and the actuating inducement to them to enter into the agreement was:

> First, to get an adjustment of the amount they claimed was due them, principally under the treaty of 1835, and,
>
> Second, to receive payment at the earliest possible date of the amount which might be found due.

"At the time of this negotiation the Cherokees had a grievance against the United States—a grievance which had burned in the breasts of two generations, and had never been forgiven or forgotten. That grievance was the treaty of 1835, commonly known as the treaty of New Echota—the corrupt method by which it had been procured, the ruthless means by which it had been executed, and the evasive way in which its obligations had been left unfulfilled. The history of this treaty and its consequences have been examined and set forth by this court, and need not be repeated here. (Western Cherokees v. United States, 27 C. Cl. R., 1.) It is enough to say that "the treaty of New Echota was the act and deed of neither the Eastern nor Western Cherokee," and that neither the Cherokee people nor the Cherokee government acknowledged it." * * *

"But while the Cherokee people always maintained that the treaty of New Echota was falsely executed in their name by a few unauthorized, unofficial persons, corruptly suborned by an agent of the United States, they nevertheless were compelled by the condition

of affairs in the Cherokee country and by the overwhelming power of the United States to, and in a measure did, adopt it through the instrumentality of the Cherokee treaty of 1846." (9 Stat. L., 871.) * * *

"Having thus become indirectly and unwillingly parties to the treaty of New Echota, the Eastern Cherokees, nevertheless—that is to say, all of those Cherokees who were divested of their lands east of the Mississippi by the treaty of New Echota in 1835—have steadfastly and persistently maintained that that treaty, harsh and inexorable as it was, has never been carried into effect according to the true import and ostensible intent of its provisions. * * *

HOW CHEROKEES UNDERSTOOD AGREEMENT OF 1891

"Interpreted in the light of the long, sore controversy which had existed between the parties, it is plain that the Cherokees believed the agreement to mean (and the United States allowed them to so believe) that all of their claims and rights and equities were to be reopened and re-examined *de novo;* and that upon the faith of that belief they made a cession of the Outlet. (202 U. S., 121; 40 C. Cl. 322.)

"Aside from the intrinsic value of the lands there was a most material consideration moving to the United States in the necessity of having that tract of land; and to the end, that the United States might be the owner of that splendid domain of territory they agreed to pay to the Indians the sum of $8,300,000; and, as a further consideration and inducement to the Indians to enter into such an agreement, it was stipulated on the part of the United States, to-wit:

"The subject-matter of the consideration upon the part of the Indians was composed of two elements; in the first they were to receive the sum of $8,300,000, a part of the consideration of the conveyance and as the second element of the consideration they were to receive, 'a complete account of the moneys due the Cherokee Nation' under all the treaties and laws which from 1817 to 1868 had been made or enacted affecting the pecuniary relations of the parties. The account was to be accepted or rejected by the Indians as they might determine. It was known to them that an alleged settlement had been made in the year 1852, the legal effect of which had always been disputed by the Indians; and the agreement to render an account 'of moneys due' 'to an unlettered party' at least would be accepted as an opportunity to be relieved from the legal effect and binding force of the alleged settlement, by and through which they had been held at arm's length through more than a generation of their people.

"Then follows another provision well calculated to operate on the minds of the Cherokee Nation as a special and material inducement to the making of the treaty or agreement of 1891. 'And upon such accounting should the Cherokee Nation by its national council conclude and determine that such an accounting is incorrect or unjust, then the Cherokee Nation shall have the right within twelve months to enter suit against the United States in the Court of Claims,' with the right of appeal to the Supreme Court of the United States by either party for any declared or alleged amount of moneys.

Consideration consists not of $8,300,000 alone, but also of other undertakings.

"The consideration therefore consists of different

elements of inducements, and in law those elements constitute and form the basis upon which the agreement rests, and none can be eliminated without the destruction of the entire force of the agreement.

"The consideration though in parts and sections is a unit, and to disturb or eliminate one element is to destroy the whole. The consideration is the basis of the contract, and without its preservation as a whole the contract falls.

"The court must therefore assume that without all of the considerations the Cherokee Nation would not have released to the United States a district of country large enough and rich enough to be one of the States of the Union.' " (40 C. Cl. 332-3-4.)

"The United States had bought the land of the Indians not for the sum of $8,300,000, but for that sum and other undertakings vital as an inducement to the Indians in making the agreement of 1891." (40 C. Cl. 336.)

THE DEFENDANT FAILED TO PAY AS AGREED

"Congress did not make the appropriation in the manner prescribed in the agreement—*'such appropriation to be made by Congress if then in session, and if not, then at the session immediately following such accounting'*—but, on the contrary, did nothing. At the end of the session the House of Representatives, on the 2nd of March, 1895, called on the Attorney-General for an opinion concerning the conclusions reached by the accountants." (40 C. Cl. 319.)

"Acting under said direction of March 2, 1895, above referred to, the Attorney-General of the United States,

on December 2, 1895, addressed a communication to the Congress wherein he advised that body of his disagreement with the conclusions reached by said Slade and Bender." (40 C. Cl. 298.)

"The Attorney-General made his reply at the beginning of the next session in December following. The second session, 'the session immediately following such accounting.' passed without Congressional action of any kind." (40 C. Cl. 320.)

DEFENDANT DID NOT KEEP FAITH

When considering this failure of the Government to make the appropriation as agreed upon, the Court of Claims made the following statement which met with the approval of this Court: "Relying on the good faith of the Government, the council of the Cherokee Indians accepted the statement of Slade and Bender and thereby wavied the right to bring a suit against the United States; and, that right being waived, founded on the action of the United States, are they not now estopped from denying the legal effect of their own act? The Indians were misled by the act of the United States when they assumed that the account after acceptance would be dealt with in pursuance of the other requirements of the treaty. Consider the rights of the litigants in the light of the law which has been announced for nearly a century by the Supreme Court of United States, the fundamental theory of which is that language must never be construed to their prejudice. (Worcester v. State of Georgia, 6 Pet. 515.)

"The position of the defendants in refusing to abide by the result of the treaty of 1893, consummated as it

was by the act of the Cherokee council, the executive officers, and the lawful authorized agents of the United States, is not keeping faith with the wards of the nation in the spirit of that 'justice and reason' recognized by the courts when dealing with the obligation of the United States as the guardian of the Indian." (40 C. Cl. 338.)

"In the case of the Choctaw v. The United States (119 U. S. R., p. 1) it is said in the syllabi:

'The relation between the United States and the Indian tribes, being those of a superior toward an inferior who is under its care and control, its acts touching them and its promises to them, in the execution of its own policy and in the furtherance of its own interests, are to be interpreted as justice and reason demand in cases, where power is exerted by the strong over those to whom they owe care and protection. (United States v. Kagama, 118 U. S., 375, cited and applied.)' " (40 C. Cl. 339.)

When Congress failed to make the appropriation the disappointment of the Cherokees was very acute. They had parted with their lands and had received only a part of the consideration therefor, and through a breach of the contract by the United States, they were deprived of the settlement and payment of an obligation about which they had bitterly complained for over half a century, and which had been the principal inducement for them to enter into the agreement of 1891, and a very material part of the consideration for giving up their land. (40 C. Cl. 320.)

They bitterly resented the opinion of the Attorney General as not being in accordance with the terms of the agreement, and urged payment as of March 4th, 1895, in accordance with the agreement of 1891, of the

amount found due by the Slade and Bender account. (Senate Doc. 215, p. 15, Fifty-sixth Cong., 1st Sess.)

On June 28, 1898, by an act of Congress commonly known as the "Custis Act" (30 Stats. L., 495) the Cherokee Nation was dismantled. Its judiciary was abolished. Its right to pass laws for the government of persons and property within its own borders was taken away. The right to enforce its own laws was denied. The right of enforcement of its laws in the courts of the United States was forbidden. It was further provided as follows:

"Sec. 19. That no payment of any moneys on any account whatever shall hereafter be made by the United States to any of the tribal governments, or to any officer thereof for disbursement, but payments of all sums to members of said tribes shall be made under the direction of the Secretary of the Interior by an officer appointed by him; and per capita payment shall be made direct to each individual in lawful money of the United States, and the same shall not be liable to the payment of any previously contracted obligation."

JURISDICTIONAL ACT OF 1902

"Not until July 1, 1902, did Congress act, and their action was merely passing the jurisdictional statute. * * * (32 Stat. L. 716.)

Section 68 of which Statute is as follows:

"Jurisdiction is hereby conferred upon the Court of Claims to examine, consider and adjuridate * * * any claim which the Cherokee Tribe, or any band thereof, *arising under treaty*

stipulation, may have against the United States (32 Stat. L. 726) (40 C. Cl. 320) (Italics ours).

By the Act of March 3, 1903, (32 Stat. L. 996) Section 68 was amended so as to:

> "to give the Eastern Cherokees, so-called, including those in the Cherokee Nation and those who remained east of the Mississippi River, acting together as two bodies, as they may be advised, the status of a band or bands, as the case may be for all purposes * * * and said section shall be further so construed as to require that both the Cherokee Nation and said Eastern Cherokees, so-called, shall be made parties to any suits which may be instituted against the United States under said section * * * and if said claim shall be sustained, in whole or in part, the Court of Claims * * * shall be authorized to render a judgment in favor of the rightful claimant, etc." (R. 18, Finding IV.)

THE ONE THING TO BE DETERMINED UNDER ACT OF 1902

In addition to the complications caused by the difference among the Cherokees themselves the matter was further complicated by the opinion of the Attorney General who had held that nothing was due under either, the Treaties or the agreement of 1891, and Congress had acquiesced in that contention by its inaction. In the circumstances the first and all essential thing to have determined under the jurisditional Act of 1902 was as to whether anything was due under the treaties as claimed by the Cherokees. (40 C. Cl. 308.)

The question as to whether these respective items should bear interest from March 4, 1895, was not considered at that time, as it was considered that this question was governed by the terms of the agreement of 1891, and did not arise under treaty stipulations, as provided for in the Jurisdictional Act; consequently it was not raised by the attorneys nor considered by the Court.

NO INTEREST CLAIMED UNDER AGREEMENT OF 1891

No interest was claimed under the agreement of 1891, but interest was claimed under the treaties as set forth in the Slade and Bender account. (See records in this Court of Cherokee Nation vs. U. S. reported in 202 U. S. 101.)

Chief Justice Nott, Justice Weldon and Justice Peele of the Court of Claims each rendered a separate opinion.

In the opinion of Chief Justice Nott it was held that the Slade and Bender account was not an account stated but nevertheless the United States were liable for the amounts stated in the account, the payment of which he held became under the agreement a part of the purchase price of the so-called Outlet. He further held that these amounts were based upon the claims of the Cherokees "arising under treaty stipulations."

In the opinion of Justice Weldon it was held to be immaterial as to whether the Slade and Bender report was treated as an account stated, since it was admitted to be correct, and was a part of the consideration for the land.

According to the contention of the United States before this Court, Judge Peele, instead

of holding himself bound by the Slade and Bender report, made examination into the treaties and statutes discussed and interpreted in that report with a view to determining the claim as arising under treaty stipulation, and as a result decided that the conclusions of law in the Slade and Bender report were correct. (Govts. Brief, page 46, in U. S. v. Cherokee Nation, etc., Oct. term, 1905, 202 U. S. 101.)

In commenting upon these opinions, this Court said:

"We agree that the United States were liable, and think the liability might well be rested on both grounds, that is, that failing one it could be sustained on the other, but we do not deem it necessary to set forth in our own language what has already been so well stated by Chief Justice Nott and Judges Weldon and Peelle." (202 U. S. 123.)

Nowhere in the opinions of these Justices, and nowhere in the decrees in this case is there mention made of the right of the Cherokees to recover interest from March 4th, 1895, on the respective items found due, but they do provide for interest from the dates the respective items became due "under treaty stipulation"—"to date of payment." (40 C. Cl. 363-5.)

In summing up the whole matter, Chief Justice Nott said:

"In the opinion of the court this case is simply one to recover purchase money upon a contract of sale. Ordinarily, in such a case, the cession would not be made, the deed would not be de-

livered until the purchase money is paid or secured, or at least, the amount be ascertained and liquidated. In this case both parties wanted to expedite the transaction. It was important for the United States that the cession of the territory should be made immediately; it was desirable for the Cherokee Nation that the purchase money be paid soon. But nevertheless, the Cherokee Nation had the right to immediate payment, and the agreement intended to secure to them the next thing to it—the right to an early payment. The accounting was merely a means to an end. The end was the immediate payment, as near as might be, of the whole consideration to be given for the cession of the Outlet. When the cession was made the purchase money was due; the only thing remaining, which was the object of the accounting, was to ascertain the exact amount. This is not the case of a party prosecuting an unliquidated debt, but a case of sale and delivery and non-payment of the purchase money for the thing sold and delivered. The United States were willing to pay; the Cherokee Nation wanted the payment made at the earliest possible day; both parties agreed upon a method by which it should be paid as nearly immediately as was possible. The United States were to render their account 'without delay'; if the Cherokee Nation accepted it, the amount was to be appropriated by Congress; such 'appropriation to be made by Congress, if then in session, and if not, then at the session immediately following such accounting.' If the Cherokee Nation did not accept the according, or regarded it as incorrect or unjust, and carried

it into the courts and recovered a judgment, Congress was to appropriate 'at its next session after such case shall be finally decided.' Nothing was left to the ordinary uncertainties and procrastinations of legislation, and no agreement could have made the obligation to pay promptly more unequivocal and specific. Time was of the essence of the contract, so far as the words of the parties could make it."

Quoted with approval by the Supreme Court at page 121, 202 U. S. from the decision of the Court of Claims. (40 C. Cl. 322-23.)

Thus it was in effect held by this Court that under the agreement of 1891, a new principal was created for each one of the 4 items given in the Slade and Bender account.

Cherokees claimed interest on $4,296,527.57, from March 4, 1895.

The Cherokees accepted the foregoing decision of the courts as limiting them in their recovery under the jurisdictional act of July 1, 1902, strictly to claims *"arising under treaty stipulations"* and proceeded at once in an attempt to procure legislation which would enable them to receive interest on the full amounts found due by the Slade and Bender account under the treaties and which the courts had held became due and payable March 4, 1895, under the agreement of 1891. As a result, on June 30, 1906 (by an item in the general deficiency appropriation act of that year), Congress appropriated the money to pay the said judgment, "with interest upon the several items of judgment at five per centum * * *."

> *"Together with such additional sum as may be necessary to pay interest as authorized by law."* 34 Stat. L. 664. (Emphasis ours.)

On April 2, 1910, the matter having again been referred to the Comptroller, it was decided that the total amount to be paid to the Cherokees on account of item two of said judgment, and the fund arising therefrom, would be the original principal sum due under the treaty of 1835, to-wit, $1,111,284.70, with interest thereon at 5% from June 12, 1838, to March 15, 1910, as the "date of payment." *When recent Jurisdictional Act was passed Congress had before it claim of Cherokees for interest on whole amount from March 4, 1895.*

The Cherokee Nation memorialized the 64th Congress for a Jurisdictional Act authorizing the Court of Claims and this court to consider and adjudicate this right, *under said agreement of 1891,* to interest on the whole of said amount, the aggregate of principals and interests due March 4, 1895. (Hearings in support of Bill H. R. 6444, Dec. 14, 1916, 64th Congress, 1st Session.)

Upon such memorial and after hearings and repeated efforts on the part of the Cherokees, Congress passed the Act of March 3, 1919, supra, (40 Stat. 1316) which among others contains the following provisions:

> That the Court shall have jurisdiction to "consider and determine the claims of the Cherokee Nation against the United States for INTEREST, in addition to ALL OTHER INTEREST HERETOFORE ALLOWED AND PAID, alleged to be owing from the United States to the Cherokee

Nation * * * and said court is authorized and empowered and directed to carefully examine all laws, treaties, and AGREEMENTS and especially the AGREEMENT * * * of 1891, * * * in any manner effecting or relating to the question of interest * * * on said funds, and if it shall be found that under said treaties, laws, or AGREEMENTS interest on one or more of the said funds, either in whole or in part, has not been paid * * * the court shall render final judgment therefor." (R. 11.) (Emphasis ours.)

VAST EMPIRE CEDED BY THE CHEROKEES TO THE DEFENDANT

"The total acreage ceded by the Cherokee people to the United States at various times to July 19, 1886, amounted to 126,906 square miles or 81,220,374 acres." (40 C. Cl. 289-9.)

It is pathetic to contemplate how the Cherokees were forced and cajoled into giving up this vast empire, which was most dear to the hearts of the Cherokees, as constituting their homes, but pathetic as is this view of the picture, it is astonishing to find, from an examination of the court records and the official records of Congress and of the Departments, how, since the first treaty with the Cherokees, in 1785, down to the Agreement of 1891, although as a matter of common knowledge the land was acquired at much less than its value at the time, almost everyone of the numerous treaties and Agreements for its purchase have been violated by the Government. This appears largely from the subsequent treaties, which, through

the insistance of the Cherokees, contain promises to perform the violated obligations of the preceding treaties, which, in turn, were disregarded. In the instant case, it would seem that it is urged that the treaty obligations promised to be performed in the Agreement of 1891, should again be disregarded. It is confidently believed this tribunal will not suffer this to be done.

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IN THE

Supreme Court of the United States

THE CHEROKEE NATION,
Appellant,
vs.
THE UNITED STATES,
Appellee.

No. 198 — October Term, 1925
(Decided April 12, 1926.)

PETITION FOR REHEARING

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States.

Your petitioner, the Cherokee Nation, respectfully prays that a rehearing be granted in this case and submits herewith its petition for such rehearing, and brief in support thereof.

Your petitioner relies on the following grounds in support of a rehearing:

FIRST: *The petitioner's claim is not one for compound interest or damages.* The opinion heretofore rendered by this Court characterized the petitioner's claim as an attempt to recover compound interest upon a sum lawfully due the Cherokee Nation from the United States, and in reality an attempt to hold the United States in damages for delay in the failure to appropriate and pay this debt. It is respectfully represented that this characterization is inaccurate. Your

petitioner in reliance upon statutes and contracts of the United States, seeks to impose one rest for interest in the computation of the amount due it by the United States. This is not a claim for compound interest. One rest only is sought. Your petitioner bases its contention that this rest for interest is proper upon two grounds, each of which, it is respectfully submitted, this Court has erroneously denied. They are stated as the fourth and fifth grounds for this petition.

SECOND: *The allowance of interest "to date of payment" is not synonymous with allowance "until paid".* At page 9 of the opinion, it is stated that Slade and Bender

> "reported that interest at 5% *until paid* should be allowed the Cherokees"

(italics ours) on the items which they found due. It is respectfully pointed out that Slade and Bender nowhere reported that interest should be allowed "until paid" but that they used the expression interest should be allowed "to date of payment". The Court of Claims provided in its decree in 1905 that interest should be allowed "to date of payment". (40 Ct. Cl. 252, 364.) This difference is material. The use of the expression "until paid" forecloses the idea of a rest for interest. The expression "to date of payment" expressly contemplates a definite point, a *terminus a quo,* from which, if the statutes so authorize, a rest for interest may be imposed.

THIRD: *The submission of the Government account to the Cherokee Indians and its acceptance by them reduced the claim to the status of an account stated.* The opinion does not consider your petition-

er's contention that upon the ratification by the Cherokees of the Government account, and upon the failure of Congress thereafter to appropriate the sums found therein, the account became "an account stated". This has been held substantially in the prior decision (202 U. S. at pages 122, 123), as the present opinion points out on page 9. The effect of this conclusion was clearly to establish the amount of this account as a liquidated debt due on March 4, 1895, upon which the Agreement of 1891, the Treaty of 1866, and the Act of 1841, and the treaties and acts of Congress making the amounts of the four items of the account trust funds all required 5% interest to be paid. It is respectfully submitted that the failure to consider this argument of the petitioner in the opinion is a ground for a rehearing of the case.

FOURTH: *The Act of 1841 and the Treaty of 1866 sustain petitioner's claim.* Your petitioner based its contention that a rest for interest as of March 4, 1895, was provided for by the Agreement of 1891, and that interest on the liquidated amount of principal and interest due on that date, was required under the provisions of the Treaty of June 19, 1866, 14 Stat. 799, 805, and the provisions of Section 2 of the Act of September 11, 1841, 5 Stat. 465, now Section 3659 of the Revised Statutes. The Act of September 11, 1841, 5 Stat. 465, now Section 3659 of the Revised Statutes provides:

> "All funds held in trust by the United States, and the annual interest accruing thereon, when not otherwise required by Treaty, shall be invested in stocks of the United States, bearing a rate of interest not less than Five Percentum per annum."

The opinion of this Court at page 12 rejected this

contention, upon the grounds: (first) that to sustain it would impose a burden upon the United States which "the Solicitor General suggests would be equal to the national debt"; because of annual or semi-annual rests for nearly a century upon a principal amount of more than $1,000,000; and (second) that the ratification by the Cherokees of the Government account foreclosed the claim. The rejection of the petitioner's contention on these grounds misconstrues the petitioner's position. The ratification in 1894 by the Cherokees of the Government account may have foreclosed any claim for semi-annual rests from 1838 to 1895. It did not and could not have foreclosed a claim for interest commencing in 1895. But no claim is made here for rests prior to 1895. Hence, the suggestion of the enormity of the claim has no pertinence. To assert that such claim is made and then deny the effect of the Treaty of 1866 and the Act of 1841 because of the unsoundness of that claim seems clearly erroneous.

In stating the petitioner's contention in this way, it is respectfully submitted, the full force of the contention has been avoided. Reliance by the petitioner upon the Act of 1841 was had upon the ground that the amount found in the Government account of four items was a fund "held in trust by the United States" as of the day, March 4, 1895, when it should have been paid, and that therefore from that date, 5% interest was due on the amount.

That this amount was a fund "held in trust" was asserted upon the ground that it represented in 1895 the restoration of four different trust funds long missing, each of which had come into existence as a trust fund under treaties or Acts of Congress. This posi-

tion of the petitioner is not answered by the argument of the enormity of the claim or by foreclosure through ratification.

It is respectfully submitted that this argument has not been answered in the opinion of the Court, and that it is entitled to prevail.

In the former case in this Court, 202 U. S. 101, 122, it was held that the amount found in the Slade and Bender account arose upon a liquidated debt—in effect an account stated, and the Court held that the sum was due as of March 4, 1895, on which date the United States was legally bound to pay. The failure to appropriate the sum on that date cannot be availed of as a defense to the argument that the United States became answerable thereafter under the trustee statutes. The United States in all its financial dealings with these Indians has occupied the position of trustee or guardian. In respect of its liabilities, the situation is actually the same as it would have been had Congress appropriated the sum when it should have done so. It will hardly be denied that had the appropriation been made, interest on it until paid would have been due the Indians. This necessarily follows under the Act of 1841, as well as under the ruling of the Senate in 1850, and the treaties.

Under the decision of this Court (202 U. S. at 121) the sums found in the account became a fund due March 4, 1895, and "time was of the essence". That sum was therefore a fund "now due the Nation, or that may hereafter accrue from the sale of their lands", to quote the Treaty of 1866. Furthermore, that sum, due but not appropriated, became in equity a fund "held in trust by the United States", and subject thereafter to 5% annual interest under the Act

of 1841, as well as under the treaties and Acts of Congress making the four respective items trust funds. No answer is found in the opinion to the argument that the amount due in 1895 fell within these provisions. It is respectfully submitted that this denial of the petitioner's contention rests upon untenable grounds, and that the substantial basis upon which it rests was not considered.

FIFTH: *The 6th Article of the Agreement of 1891 expressly provides for the payment of interest on this amount.* The opinion of the Court at page 11, rejects your petitioner's contention that the 6th Article of the Agreement of December 19, 1891, between the United States and the Cherokee Nation, as ratified by Section 10 of the Act of March 3, 1893, (27 Stat. 640) requires the payment of interest at 5% per annum by the United States upon the so-called "old claims" which were stated and settled in the Government account, and in the decision of this Court, reported in 202 U. S. 101. The language in question reads:

> "So long as the money or any part of it shall remain in the Treasury of the United States after this Agreement shall have become effective, such sum so left in the Treasury of the United States shall bear interest at the rate of 5% per annum, payable semi-annually".

The opinion holds that this language does not refer to the amounts found due under the old claims and gives in support of its conclusion the following reason:

> "In any view, it did not and could not refer to amounts due on past account because at the time the Agreement of 1891 was made they were not fixed in amount and awaited a possible adjudi-

cation to determine them and full treatment of them was given in Article 4 of the Agreement. The Sixth Article did not apply to them at all."

It is respectfully submitted that the fact that these claims were not fixed in amount in 1891 is no reason for denying the application of the interest provision of the Agreements to the amounts, whenever they should be ascertained. The language of the Agreement refers to "the money or any part of it". It will hardly be denied that had Congress appropriated the amounts found due under the Government account, on March 4, 1895, as this Court and the Court of Claims agreed in the earlier decision Congress was legally and morally bound to do, the interest-bearing provision of the Sixth Article would have applied to this sum. The money thus appropriated would clearly have been within the language "the money or any part of it". The fact that the sum was not fixed at the time of the execution of the Agreement would not have been material. No more is it material here.

Furthermore, in the same sentence in which the interest-bearing provision occurs (R. p. 4) there is a proviso for the retention in the Treasury of part of the consideration money, which shows that this sentence applied as well to the old claims as to the principal cash amount. Especially is this true in view of the facts as found and announced in the original case that it was the difference over the distribution of item 2 which almost rent the nation asunder. This difference was not settled until by decision of this Court in 1906.

This point is discussed in detail in the brief submitted herewith. See brief pages 39-40.

A substantial ground of your petitioner's case was upon this interest-bearing provision. It is respectfully

submitted that the rejection of this contention has been made upon inadequate grounds. In a case of this importance, where every doubt as to the construction of an instrument is to be resolved in favor of the Indians, a rehearing should be granted where any question exists as to the soundness of the decision.

SIXTH: *The Statements in the Court's opinion that the Cherokees have been overpaid is erroneous.* It is respectfully submitted that the Solicitor General's argument which the Court adopted in its conclusion that the Cherokees have been overpaid fails properly to present the true state of the accounts between the parties. The brief filed herewith discusses this point in detail and reference is now made thereto. The petitioner was unable to meet this argument of the Solicitor General, first submitted in his brief, because his brief was not served on your petitioner until this case appeared on the call of this Court. In the brief filed herewith it conclusively appears that the Cherokees have in fact been subjected to an underpayment of several thousand dollars. Under a recent jurisdictional Act litigation is in process of being started covering this controversy as to overpayment. It is respectfully submitted that this litigation should not be prejudged by the opinion in this case, where overpayment is not in issue.

SEVENTH: In any event the Cherokees are entitled to interest at 5% per annum on the respective amounts, principals and interest, of items 2 and 3 of the judgment of 1906, from July 2, 1906, the date upon which said amounts were paid to the Secretary of the Interior in trust for the Cherokees, for the reason:

First, that it was provided in the Treaties and Acts of Congress relating to the funds composing these two

items that they should bear interest at 5% while in the hands of the Secretary of the Interior.

Second, that the agreement as finally ratified March 3, 1893, also provided that said funds should bear interest at 5% from the date the agreement became effective, and which could not have been later than the date of payment under the judgment. It is respectfully submitted that it will be shown if an opportunity be given to do so, that interest has not been paid on the respective *amounts* of items 2 and 3 from July 2, 1906, the date these amounts were paid into the Treasury nor on such balances as may have remained after certain amounts herein referred to were paid therefrom.

WHEREFORE, your petitioner respectfully requests that a rehearing be granted at such time as the Court may deem fit.

Respectfully submitted,

FRANK J. BOUDINOT,
Attorney of Record.

JOHN W. DAVIS,
C. C. CALHOUN,
WILFRED HEARN,
LESLIE C. GARNETT,
Of Counsel.

The undersigned respectfully certify that the foregoing petition is presented in good faith and not for delay, and that in their opinion, a rehearing should be granted in this case.

JOHN W. DAVIS.
C. C. CALHOUN.

ARGUMENT

I.

The Government's account, prepared by Slade and Bender, and rendered by the Government to the Cherokees as being the Government's statement of the correct amount due, and accepted by the Cherokees as such, became an account stated, especially when transmitted by the Secretary to Congress, with his approval, for appropriation.

It is most respectfully submitted that it is important, at the threshold of this discussion for the above material question to be correctly determined. It is somewhat surprising that in the unusual number of times the courts have been called upon to consider questions growing out of the transactions from which this cause of action arises, that this question has never been properly presented to or directly passed upon by the courts.

Most unfortunately, for the reasons given herein, the question was not, in the instant case, presented as one of the material questions for the court's consideration. By reason of the fact that this is an expiring appeal of a defunct nation, a rapidly disappearing people, for what they consider to be a part of the consideration for one of the last remnants of their vast empire, the court's indulgence is prayed for a mature consideration, even at this late hour of this, together with other material questions affecting this Petition for a re-hearing.

Confusion caused by referring to the account prepared under the agreement of 1891 as the Slade and Bender "Account" or "Report."

Section 4 of the Agreement of 1891 provides that:

> "The United States shall, without delay, render to the Cherokees * * * a complete account of monies due the Cherokee Nation."

In accordance with this provision the Secretary of the Interior appointed two of his expert accountants, Messrs. Slade and Bender, to prepare this account for the consideration and action of the Secretary. Messrs. Slade and Bender submitted the account to the Secretary, who approved it and he, the Secretary, acting for the United States, rendered the account to the Cherokees, therefore, this account, when rendered to the Cherokees was not the account of Slade and Bender, but the account of "the United States."

It appears that the attorneys in the former suit, *Cherokee Nation, et al.* (40 C. Cls. 252), erroneously attached great importance to the fact that this account had been prepared by Government experts and, therefore, the attorneys contended that it should be treated as an award of arbitrators or as the findings of an umpire and strongly impressed upon it the term "the Slade and Bender report" or "account."

This has given an undue and misleading personal equation to the account and caused to a great extent the important factor to be lost sight of, namely; that it was nothing more nor less than the Government's account, rendered by it in accordance with the Agreement of 1891, and subsequently agreed to and accepted as correct by both parties.

Unfortunately, this erroneous contention has led to much useless discussion concerning the Slade and Bender

account or report, as such. In this application for a re-hearing, and brief, this account will be referred to as it actually was—the Government's account.

This naturally leads to a consideration of the nature of this Government account when rendered in pursuance of the Agreement of 1891.

In urging their contention that the so-called Slade and Bender account, when rendered by them, was in the nature of an award or finding of an umpire, the attorneys also urged that at the time this account was rendered by Slade and Bender to the Secretary and submitted by him to the Cherokees it was an account stated. This led the Court of Claims to hold that the so-called Slade and Bender account, when submitted by the Secretary to the Cherokees for their consideration and action, was not an account stated because it was submitted by the debtor and not the creditor. This view has, to a certain extent, been followed by this Court.

In the instant case, in referring (page 9) to the decisions of the Court of Claims and this Court, in the former case, on this question, the opinion says that it was argued on behalf of it (the Government) that Slade and Bender were merely accountants employed by the Government to state the account; that the Cherokees were not bound by the report and that the Government could not be bound by such a report in which the accountants exceeded their authority as mere accountants and exercised their functions as if authorized to act as arbiters or umpires, and that:

> "This Court stated its adverse conclusion on this point by quoting and approving the language of Chief Justice Nott in the Court of Claims (202 U. S. 101 at pp. 122, 123), as follows:

" 'The Court does not intend to imply that when the account of Slade and Bender came into the hands of the Secretary of the Interior he was bound to transmit it to the Cherokee Nation. On the contrary, the Cherokee Nation had not agreed to be bound by the report of the accountants and could not claim that the United States should be. The accountants were but the instrumentality of the United States in making out the account. When it was placed in the Interior Department it was as much within the discretion of the Secretary to accept and adopt it or to remand it for alterations and corrections as a thing could be.' "

Admitting all this to be true, the statement refers and can refer only to the time prior to when the provisions of the Agreement as to payment became final and conclusive. This latter date was December 1, 1894, when agreed to and accepted as correct by the Cherokees, at which time, this account became an account stated, or at the latest January 7, 1895, when again agreed to by the Secretary and transmitted to Congress as the account rendered and agreed to according to agreement.

Preceding this above quotation, the opinion in the instant case refers to the Slade and Bender statement as the Slade and Bender "Report", but immediately following this quotation, this opinion says:

> "the Court (of Claims) proceeded to find the interest due as directed in the Slade and Bender ACCOUNT" (Emphasis ours)

thus the opinion, apparently, treats the account, after its acceptance by the parties, as an account stated.

In this connection, it should be borne in mind that on March 3, 1893, the Agreement was finally accepted by Congress and an appropriation made for part of

the purchase price of the land and provision made for the payment of the balance of the $8,596,736.12, and that on May 17, 1893, the amended agreement was formally accepted by the Cherokees in the agreement of the cession of the land.

We agree that the Court of Claims was right in holding, in effect, that when the account was transmitted to the Cherokees for their consideration and action, although it had the approval of the Secretary, it was not at that time an account stated. However, after it had been accepted by the Cherokees and adopted by them as their statement of the amount due, having theretofore been approved by the Government, through the Secretary, it assumed a very different status. Up to that time it was simply a statement which had been prepared by the accountants of the Government, the debtor, for the consideration of the Cherokees, the creditor, but after it had been acted upon by the Cherokees and adopted as a statement of their account against the Government and then transmitted, as such, by them, to the Government, and again accepted by it, the debtor, as correct, and finally transmitted by the Secretary to Congress for appropriation (R. 17) it not only possessed all of the essential elements of an account, stated, but became, in fact, such an account.

In the opening sentence of its opinion, the Supreme Court announced that:

> "The correctness of the account is conceded." (202 U. S. at p. 120.)

There can be no question that a full statement of all the facts as disclosed by the record brings this case squarely within the definition of an account stated as

defined by this Court in the case of *Toland* vs. *Sprague,* 12 Peters 300 at page 335 where it said:

> "We agree with the Court that the mere rendering an account does not make it a stated one, but that if the other party receives the account, admits the correctness of the items, claims the balance, or offers to pay it, as it may be in his favor, or against him, then it becomes a stated account. Nor do we think it at all important that the account was not made out as between the plaintiff and defendant; the plaintiff having received it, having made no complaint as to the items or the balance, but on the contrary having claimed that balance, thereby adopted it; and by its own act treated it as a stated account."

and at page 333:

> "But when the account is stated between the parties, or when anything shall have been done by them which, by their implied admission, is equivalent to a settlement, it has then become an ascertained debt. * * * In short, when there is a settled account, that becomes the cause of action, and not the original account." (See *Young* vs. *Godbe,* 15 Wall. 562; *Goddard* vs. *Foster,* 17 Wall. 123.)

In the former case, the question of whether or not the account was an account stated turned out not to be material, for, said the Court in that case:

> "The question is not whether it was or not an account stated, but what may be the liability of the parties under the specific agreement." (*Cherokee Nation, et al.* vs. *U. S.* 40 C. Cls. 252 at page 321.)

Therefore, the discussion in the former case on the question as to whether the account became an account stated should be regarded in the nature of dicta.

The opinion in the present decision at page 9 further says:

> "The chief controversy in that case was as to the liability of the Government at all for the removal expenses of the Eastern Cherokees."

In the light of the foregoing, it is respectfully submitted that upon a careful consideration of the principles governing the question, when applied to the facts in the instant case, the conclusion is inevitable that the account finally became an account stated, and this before March 4, 1895.

This Court and the Court of Claims having held that the payment on March 4, 1895, of the amount shown to be due by the account constituted a part of the consideration of the purchase price of the land theretofore ceded and it having been established beyond question that the Government's account became an account stated, and agreed upon as showing the correct amounts due, we are brought to a consideration of the next question in logical sequence. The correct determination of this question of an account stated aids materially in a correct determination of the next question:

II.

That what the Cherokees are seeking to recover in this suit is not compound interest.

On page 12, the opinion says:

> "It is urged that the largest item of $1,114,000 was taken out of a $5,000,000 trust fund held by the United States for the benefit of the Cherokees and, therefore, that it should be treated as if it were always in the Treasury of the United States

held in trust for the Indians, and as if the United States had collected the interest thereon out of the invested stocks and had refused to pay it over as annuities to the Indians. This claim proves too much. It would require compound interest brought about by annual or semi-annual rests for near a century, an amount that the Solicitor General suggests would be equal to the National debt."

If it be meant by the above that this contention was urged on behalf of the Cherokees, it is respectfully submitted that this is most erroneous. On page 39 of Appellant's original brief, when referring to the four items as belonging to trust funds, the following language is used:

> "But Item 2, was taken from the $5,000,000 interest-bearing treaty fund, and when *restored thereto* it becomes a trust fund in the hands of the United States, bearing a rate of interest not less than five per centum per annum. * * * The interest as authorized by law that should have been computed and paid is that provided in the said agreement of December 19, 1891, ratified by the Act of March 3, 1893."

The reference therein to interest as authorized by law being to the provision, "so long as the money or any part of it shall remain in the Treasury of the United States, after this agreement shall have become effective, such sum so left in the Treasury of the United States shall bear interest at the rate of 5% per annum, payable semi-annually." It was also contended that the time from which this interest should run was when the money became due and payable, which the courts held, was March 4, 1895.

In the Solicitor's brief, it was urged that this contention was without merit because the money had not

been paid in to the Treasury of the United States. In other words, it had not been appropriated or set aside for this particular purpose or transferred from one account to another.

In response to this contention of the Solicitor, it was stated on behalf of the Cherokees (p. 11 of the Reply Brief):

> "it is a familiar rule of Equity that Equity considers that as done which ought to have been done and therefore that the purchase money was potentially in the Treasury of the United States as a trust fund and ought to be treated as if invested for the benefit of the Indians at 5% interest."

In other words, it was contended on behalf of the Cherokees that under the Agreement of 1891, certain amounts were found to be due the Cherokees, which amounts were conceded to be correct and which became liquidated and which were agreed to be paid on a certain date as a part of the purchase price of the land; that the Cherokees were entitled to interest on the entire amount of this liquidated debt, although composed of principal and interest from the date it became due and payable; and that the government was estopped from claiming as a defense that the money had not been appropriated because this would be taking advantage of its own wrong in violating its own agreement, to make the payment at the time agreed upon, which latter, this court and the court of claims held to be a fact.

This Court has held that when money should have been paid into an interest-bearing trust fund but was not paid when due interest will be allowed from the date it should have been paid. See *Blackfeather* case, 155 U. S. 192-193 *(infra)*.

It was further contended that the Agreement provided for a rest for interest and for this reason, interest was claimed from that date, not as compound interest but interest on a liquidated debt which for a valuable consideration, was agreed to be paid by a certain time. This is far from what the opinion says was the contention.

Contention of Cherokees Correctly Stated.

In order that there may be no misunderstanding on this question, may we be pardoned for concisely stating the present contention, which is:

1. That the Agreement of 1891, in fixing the date of payment for the amounts agreed upon and found to be due, provided a rest for interest.

2. That in accordance with this agreement the Government rendered an account showing certain amounts to be due; that these amounts were conceded by the parties to be correct and that this account afterwards, through its acceptance by both parties, became an account stated; that the respective items of this account were liquidated, and that the account became a liquidated debt.

3. That in the exercise of the authority with which he was vested, the Secretary accepted the account for the Government as being correct and an account stated and that his action was ratified and approved before March 4, 1895, through the inaction of Congress.

4. That a part of the consideration for the purchase price of the land was the payment, by a certain designated time, of this amount, so found to be due, conceded to be correct and accepted.

5. That all the elements, whether principal or interest, composing the four items of this liquidated debt,

or account stated, lost, completely, their identity, as such, when the obligations became liquidated or an account stated and were merged into and became a new obligation consisting of the four respective items of the account.

6. That each of the four items of this liquidated debt and new obligation belonged to interest bearing trust funds, in the hands of a trustee under express trusts, therefore, that whatever amounts were found due under the Government's account and agreed to be paid, whether principal or interest or both, belonged to and were parts of interest-bearing trust funds, for interest on which the trustee was liable.

7. That the Cherokees are entitled to interest on these four trust fund items, principal and interest, from the date of payment, as fixed in the agreement, in accordance with the provisions of certain treaties and general acts of Congress applicable to such trust funds and according to the settled policy as announced in this opinion on Page 8:

> "That in the past financial dealings between the United States and the Cherokee on debts due from the former to the latter, interest at five per cent. until payment was to be allowed as if stipulated."

8. That had the money been appropriated to pay these four items, as agreed, it cannot be denied that the total amount of principal and interest of such trust funds would have borne interest at 5% from the date of payment, as fixed in the agreement.

9. That the Cherokees are also entitled to interest at 5% on this liquidated debt, or account stated, under the provisions of the Agreement of 1891.

10. That under the Agreement March 4, 1895, was

the "date of payment" of the respective items of this account for a valuable consideration.

11. That the obligation was completely binding upon the government to pay the account upon that date, and that the action or inaction of Congress in not appropriating the money therefor could not change or abrogate the binding effect of the obligation. It might delay but could not defeat that obligation.

12. That the failure of one department of the Government to take the proper action to place certain interest-bearing trust funds, admitted to be due, in the Treasury of the United States could not defeat the liability of the Government under certain treaties and general acts of Congress, applicable to such funds, for interest on such funds, from the agreed date of payment.

13. That the failure of one department of the Government to take the necessary action to have placed in or to have transferred to the proper accounts in its Treasury, on or before the agreed date of payment, the amounts of this liquidated debt, or stated account, could not and did not defeat the government's liability for interest under the agreement of 1891, on the aggregate of such amounts, from the date of payment.

All of the argument that the Solicitor urged against this latter contention was to iterate and re-iterate that compound interest was claimed.

Let us repeat that what the Cherokees are asking is not the compounding of interest but the payment of simple interest at 5% on an account stated or the liquidated amount which was admitted by the Government to be due and which was to be paid at a certain time *as a part of the purchase price of a great area obtained from the Cherokees, at a price much less than*

it was worth at the time, the non-payment of which sum, on or before the time from which interest is asked, the Court of Claims has held, affirmed by this court, constituted a breach of contract and of good faith by the Government with its wards. (202 U. S. at p. 122.)

It is almost a universal rule that where, in transactions of long standing, if the debt becomes liquidated or an account stated, that the various elements, principal, interest, etc., composing such liquidated debt, or account stated, become merged into the obligation and lose their identity and that thereafter interest on such liquidated debt or account stated is not compound interest.

Why March 4, 1895, a Rest for Interest.

Following this rule, interest is claimed herein from March 4, 1895, and not from any other date because, under the agreement, that happened to be the date fixed for a rest for interest, the date upon which the Agreement became effective; as the, "date of payment", to which interest should run under the old conditions and from which interest should run under the new conditions, brought about by the Agreement; the date upon which the Indians indulged in the delusions of hope, by which they were made to believe that, "the long sore controversy which had existed between the parties," over, "a grievance which had burned in the breasts of two generations, and had never been forgiven or forgotten," (40 C. Cls. at pp. 314, 322) would finally be adjusted and because that was the date which had been fixed for the final culmination of this matter of great importance to the Cherokees, and to which the Court was referring when it said:

> "Nothing was left to the ordinary uncertainties and procrastinations of legislation, and no agreement could have made the obligation to pay promptly more unequivocal and specific. Time was of the essence of the contract, so far as the words of the parties could make it." (202 U. S. at p. 122); and

because that was the date upon which the trustee or guardian had solemnly agreed to make the final settlement of the liquidated debt, or account stated, a matter most vital to the wards or cestui qui trustents, and because that was the date, as fixed by the court, upon which, "the purchase money for the thing sold and delivered," should be paid. (202 U. St. at p. 122.)

The only answer made to this is the query of the Solicitor as to why this date was selected and the suggestion of the Solicitor, predicated upon a misconception of the contention on behalf of the Cherokees, in which, at page 35, he says:

> "The contention of the appellant that the funds owing from the United States to the Cherokee Nation should be treated as trust funds in its Treasury, invested in interest-bearing obligations of the United States, *demands too little as well as too much.* (Emphasis ours.) Applied logically, the result would be that the principal items stated in the Slade and Bender account to have been owing from the United States from 1819, and from 1838, and from 1874, and from 1893, should be treated from those dates as trust funds invested for the benefit of the Indians in interest-bearing securities of the United States, and the income thereon reinvested as it accrued, with the result that interest on these various items from the date the original obligations arose should be compounded annually or semi-annually for a hundred years or less, thus producing an obligation to the Indians

comparable in size to the national debt." (Emphasis ours.)

The Solicitor could hardly have maturely considered the full force of this startling statement. According to this theory, "applied logically," in this unequal contest between the strong and the weak, the amount involved should in order that the strong might be protected, cause justice to open her eyes in amazed consternation and equity to lose her virtue.

But it is evident that the suggestion of the Solicitor was made more in jest than seriousness for as a simple analysis of the contention will demonstrate the theory, when "logically," if correctly applied, would bring about no such calamity as the Solicitor suggests.

In the first place: It is not intimated, in the contention, that interest rests were fixed semi-annually or annually during the long period to which the Solicitor dramatically refers; nor that such rests should be fixed constructively by law or otherwise. In fact, by not selecting any other date prior to that fixed by the Agreement it might well be argued that it is assumed that no other existed and that the Cherokees waived all right to any such claim.

Secondly: It is not the contention of the Cherokees that by reason of these being trust funds, March 4, 1895, thereby became an interest rest, or that any other interest rest, prior to that date, was constructively or otherwise fixed by the treaties or Agreements, other than the Agreement of 1891, and it is not believed that under these treaties and agreements this could be done, but it is most respectfully urged that March 4, 1895, having been fixed by the Agreement for the payment or turning over by the Trustee of the amounts agreed to be due to the respective trusts, that it thereby became

a definitely fixed and established date for a rest for interest.

In the third place: When the facts are "applied logically," and according to the Solicitor's suggestion, it appears so fantastic as to confirm the supposition that it was offered good humoredly.

This is not a case of leaving *something* to the imagination but with a bare suggestion, *all* is left to the imagination. This child of the Solicitor's imagination resembles in some respects the scriptural character of Melchizedek "without beginning of time or end of days." While he suggests that this child of his imagination may have beginning of time, he leaves it wholly without end of days.

It is respectfully submitted that the most that could be claimed logically or justly, from this erroneous construction which the Solicitor attempts to put upon the contention of the Cherokees, is for annual interest based upon yearly rests.

Had the Solicitor, in the flight of his imagination, paused long enough to have made the calculation, he would have found that the claim, based upon this supposition of annual interest from the respective dates he names to the time the case was argued, would have amounted to $8,242,861.98, which is the utmost that could have been claimed under the erroneous construction placed by the Solicitor upon the Cherokee's contention.

But if the flight of the Solicitor's imagination be followed "like a sinking star beyond the utmost bound of human thought," and the strictest rules of real compound interest, compounded annually, be applied covering the period referred to it would amount to $76,949,283.64, which is only $20,005,808,707.96

short, the public debt at that time being $20,082,740,-991.60. But what is a matter of such small change between friends.

But this is chasing a will o' the wisp, and is referred to only in a spirit of good humor and in order that the court might not be further misled by it, since the court would, doubtless, be reluctant to make the calculations which the suggestion involves, and might accept it as carrying some little weight.

This leads to a consideration of a further question which although it was set up in the allegations of the petition (R. 8) and submitted on behalf of the Cherokees on pages 34-5 and elsewhere in Appellant's brief, it has not been passed upon and the opinion makes no reference whatever to this very material question:

III.

That each of the amounts composing the four items of the Government's account, prepared by Slade and Bender, belonged to and was due to an interest-bearing trust fund and that these respective amounts were, on March 4, 1895, held by the Government as trustee for the Cherokees.

Without in the least conceding that the Cherokees are not entitled to recover under the interest provision of the Agreement of 1891, as a matter of law, interest from March 4, 1895, on the sum of $4,296,527.57, the aggregate of the four items including principal and interest of the Government's account, there can be no question that they are also entitled to recover on each of the amounts of the respective items of the account from "the date of payment," namely March 4, 1895, subject, of course, to the payments which had thereto-

fore been made, upon the ground that these items stood in 1895 as restorations of trust funds.

From the opinion this question seems not to have been passed upon, although it was alleged in the petition (R. 8) and submitted on behalf of the Cherokees at pages 34-5 of the original brief and elsewhere in the briefs. The opinion, on pages 11 and 12, refers to the Treaty of July 19, 1866 (14 Stat. 791, 805) and the Act of September 11, 1841 (5 Stat. 465) in relation to Item 2 of the account, but even as to Item 2, the opinion, it is respectfully submitted, does not correctly state the contention made on behalf of the Cherokees, to which reference will be made later.

It is admitted that counsel receive much encouragement from the fact that the opinion makes no reference whatever to the very material question that the amount of the several items, admitted to be due in this Government's account, which became an account stated, belonged to certain specific interest-bearing trust funds made so under separate treaties or Acts of Congress. In other words, that these respective items belonged to certain definitely designated trust funds, made so by special provisions in other treaties and Acts of Congress, entirely independent of the Act of 1841, which was general in its nature and application. The Act of 1841 came into application when these trust funds were restored by the account stated on March 4, 1895.

That these amounts belonged to trust funds appears from the following:

ITEM 1

This item arose under the Treaty of 1819 and was the value of three tracts of land containing 1700 acres

at $1.25 per acre ($2,125.00) to be added to the principal of the "school" fund as found in the Government's account. (R. 17.)

The Treaty of 1835, Article 10, provides that:

> "The President of the United States shall invest in some safe and most productive public stocks of the country for the benefit of the whole Cherokee Nation who has removed or shall remove to the lands assigned by this treaty to the Cherokee Nation west of the Mississippi the following sums as a permanent fund for the purposes hereinafter specified and pay over the net income of the same annually to such person or persons as shall be authorized or appointed by the Cherokee Nation to receive the same and their receipt shall be a full discharge for the amount paid to them * * * The sum of one hundred and fifty thousand dollars in addition to the present school fund of the nation shall constitute a permanent school fund, the interest of which shall be applied annually by the council of the nation for the support of common schools and such a literary institution of a higher order as may be established in the Indian country." (7 Stat. 1. 478.)

ITEM 2

This item amounting to $1,111,284.70 "improperly charged to the Treaty fund" as held by the Government's account, (R. 17) arose under the Treaty of 1835, (7 Stat. L. 479) where in Article 15;

> "It is expressly understood and agreed between the parties to this treaty that after deducting the amount which shall be actually expended * * * provided for in the several articles of this treaty the balance whatever the same may be shall be equally divided between all the people belonging to the Cherokee Nation each according to the census just completed."

This understanding of the parties is reaffirmed and made more definite in Article 9 of the Treaty of 1846 (9 Stat. L. at 875) as follows:

> "The United States agree to make a fair and just settlement of all moneys due to the Cherokees * * * and the several sums provided in the several articles of the treaty, to be invested as the general funds of the nation; and also all sums which may be hereafter properly allowed and paid under the provisions of the treaty of 1835. The aggregate of which said several sums shall be deducted from the sum of six million six hundred and forty-seven thousand sixty-seven dollars, and the balance thus found to be due shall be paid over, per capita, in equal amounts to all those individuals, heads of families or their legal representatives, entitled to receive the sum under the treaty of 1835."

In Article 11 of the treaty of 1846, it was agreed to submit to the Senate of the United States the question as to whether this was an interest-bearing fund.

As stated in the opinion in the instant case, at page 8,

> "In that capacity it (the Senate) adopted the following resolution:
>
> 'Resolved, That it is the sense of the Senate that interest at the rate of 5 per cent per annum should be allowed upon the sums found to be due to the Eastern and Western Cherokees respectively, from the 12th day of June, 1838, until paid.'" (40 C. cl. 279 Sen. Journal, 31st Cong. 1st, p. 602.)

ITEM 3

This Item, amounting to $432.28 was a part of the receipts from a sale of trust lands the proceds of which, under Article 23 of the Treaty of 1866, were to

be invested in United States registered stocks at their current value, and were to be distributed to the school fund, the orphan fund and the general fund (14 Stat. L. 799). All of these were interest-bearing trust funds under Article 10 of the Treaty of 1835, which is quoted *supra* immediately following the first item.

ITEM 4

This item, amounting to $20,406.25, consists of interest paid by the United States to the Choctaws on $15,000.00 from June 4, 1863, to August 18, 1890, and "improperly charged to the Cherokee National Fund", Government's account (R. 17) an interest-bearing trust fund.

In referring to this transaction, the Solicitor's brief (p. 50) says:

> "It seems to have been considered by the parties to this transaction that Item 4 was a trust fund."

It would seem that the contention that these several items were interest-bearing trust funds is too well established to admit of controversy for the opinion, in the instant case, at the bottom of page 8, says:

> "We have already held, in The Old Settlers case, *supra,* and in *United States* vs. *The Cherokee Nation, supra,* that in the past financial dealings between the United States and the Cherokee on debts due from the former to the latter, interest at five per cent, until payment was to be allowed as if stipulated. This result followed from a decision by the Senate of the United States acting as umpire between the two parties in 1850."

This statement of the Court is completely justified by the pertinent part of the judgment of the Court of Claims, affirmed by this Court, as follows:

"It is this 18th day of May, A.D. 1905, adjudged, ordered, and decreed that the plaintiff, the Cherokee Nation, do have and recover of and from the United States as follows * * * the proceeds of said several items, however, to be paid and distributed as follows:

"The sum of $2,125.00 (Item 1) with interest thereon * * * shall be credited on the proper books of accounts to the principal of the 'Cherokee School Fund' now in the possession of the United States and held by them as trustee."

The "Cherokee School Fund" was, as shown above, a five per cent interest-bearing trust fund.

"The sum of $432.28 (Item 3) with interest thereon * * * shall be paid to the Cherokee Nation * * *."

This amount as shown above was the proceeds from the sale of trust land and original principal and interest thereon to that date (as then calculated) was paid to the Secretary of the Interior (the United States), as trustee.

"The sum of $20,406.25 (Item 4), with interest thereon * * * shall be * * * credited on the proper books of account to the principal of the 'Cherokee National Fund', now in the possession of the United States and held by them as trustees."

This "Cherokee National Fund" was, as shown above, a five per cent interest-bearing trust fund.

"The sum of $1,111,284.70 (Item 2), with interest thereon * * * shall be paid to the Secretary of the Interior to be by him received and held for the uses and purposes following: * * *

"Second: The remainder to be distributed directly to the Eastern and Western Cherokees * * * (Finding IV R. 19; 40 Ct. Cls. 363-365)"

In the instant case, the opinion said, at pages 8 and 9 that this was a five per cent interest-bearing fund and in support thereof cited the decision of the Senate in 1850.

The above very significant part of the judgment of 1906, was omitted from the Solicitor's brief.

Thus it is established from certain treaties and Acts of Congress providing for such funds that the amounts, principal and interest, composing these respective items belonged to certain specifically designated trusts and that they were so recognized in the judgment of the court.

Trust Funds Held Under Express Trusts.

Not only this, but it appears beyond question that these amounts were held by the Government as trustee of express trusts. This Court in Chicago M. & St. P. R. Co. v. Des Moines U. R. Co., 254 U. S. at page 208, said:

> "It needs no particular form of words to create a trust, so there be reasonable certainty as to the property, the objects, and the beneficiaries. (*Colton* vs. *Colton*, 127 U. S. 300, 310, 32 L. Ed. 138, 142, 8 Sup. Ct. Rep. 1164) * * * Various instruments may be read together in order to ascertain the intention to establish one. (*Loring* vs. *Palmer*, 118 U. S. 321, 340, 30 L. ed. 211, 218, 6 Sup. Ct. Rep. 1073.)"

It is equally as clear that the general definition of an express trust is applicable, namely: "Express trusts are those which are created by the direct and positive acts of the parties, by some writing, deed, or will."

March 4, 1895, as stated by this court and the Court of Claims, was fixed as the final date of payment of the aggregate of these trust fund amounts, principal

and interest, (202 U. S. at page 123; 40 C. Cls. at page 253). The Court of Claims in the instant case found:

> "The principal due on said amounts on March 4, 1895, was $1,134,248.23, and the interest was $3,162,279.34, and the principal and interest amounted to $4,296,527.57." (R. p. 17, Finding III)

It was also held by this Court, and the Court of Claims, that a part of the consideration of the purchase price of the land was the payment, on the date agreed upon therefor, of the amounts agreed upon as being due. (202 U. S. at pages 121-2, 40 C. Cl. 322-3.)

The correctness of our contention is illustrated by simply assuming that the money, principal and interest, was paid to the trustee or guardian or even debtor, according to the agreement, namely, on March 4, 1895. Had this been done, no one would contend that the Cherokees would not have been entitled to interest on said interest, so paid, from the date paid, exactly as the courts have held, the Cherokees were entitled to interest on the principal from that date. Yet, if the money had been paid, this would have resulted in the payment of precisely the same kind of so-called compound interest against which the Solicitor so stoutly protests.

> "Interest on an account stated begins to run from the date it is stated." (*Young* vs. *Godbe*, 15 Wall. 562, *Goddard* vs. *Foster*, 17 Wall. 123.)

We earnestly urge that this principle which we seek to have applied, is not founded upon the rule of compound interest as such, at all but upon a sound and most fundamental principle of equity, governing fidu-

ciary relations and which, if abandoned, would lead to no end of injustice and deprive the cestui qui trustents and wards of one of their greatest protections. It would say to the trustee or guardian, "You may, with impunity, take advantage of your own wrong; you do not have to come into court with clean hands; just retain all interest which comes into your hands from trust funds as long as you please without turning it over when due to the cestui qui trust or trust estate, and thereby escape, altogether, the liability of any accounting for the use of these funds on the plea that to hold you accountable therefor, would be demanding that abhorrent thing of compound interest."

In the instant case, the amount of interest claimed to be due, was conceded to be correct. This amount was agreed to be paid on or before a certain date. The account which had been accepted by both parties provided, by their use of the words, "To date of payment," that the respective items should bear interest to that date of payment and the government expected it to be paid on that date and that the interest, when so paid, would bear interest, just as the other parts of the respective trust funds did. That is, the Secretary, who was the authority, acting for the government, shows that he expected it to be paid, on that date, by transmitting to Congress the account, with his favorable recommendation, so that Congress might make provision for the payment of the interest, together with the principal agreed to be paid on that date. This interest, in the regular course, would be placed to the credit of the respective trust funds, designated in the account, and bear interest as the other parts of those funds. All that prevented this from happening was the failure of one department of the government to

take such action as would enable the government to do what it had agreed, through the Secretary, to do in accordance with his unquestioned authority.

It being clear that the aggregate amount of principal and interest found in the account stated as of March 4, 1895, became a single trust fund for each of the four items, it remains to consider the statutes, treaties, and contract provisions requiring the United States to pay interest on such funds. This is covered in Points V and VI *infra*.

IV.

SUBSTITUTION OF THE WORDS "UNTIL PAID" FOR THE WORDS "TO DATE OF PAYMENT"

The opinion says:

> "That the accountants, Slade and Bender, reported that interest at 5% *until paid* should be allowed." (Emphasis ours)

and on page 10 the opinion says:

> "The Court (Court of Claims) then proceeded to find the interest due as directed by the Slade and Bender Account without any suggestion of a rest for interest in 1905, or any thing other than simple interest at five per cent *until paid*." (Emphasis ours)

The question submitted to the court, at that time, was as to whether the Government owed the amounts stated in the account and the question of an interest rest was not submitted to the court, but, notwithstanding this, the court also fixed the date upon which the debt became due and payable, as a part of the consideration of the purchase price of the land, and held

that the Government had breached its contract and broken its faith with its wards and cestui qui trustents.

The court was not asked to determine the question of rests or whether the Cherokees were entitled to recover on the amount due March 4, 1895. An examination of the jurisdictional act will show that the court did not have jurisdiction to determine this question.

This jurisdictional act of 1902 provides as follows:

> "Jurisdiction is hereby conferred upon the Court of Claims to examine, consider, and adjudicate, with right of appeal to the Supreme Court of the United States * * * any claim which the Cherokee Tribe, or any band thereof, *arising under treaty stipulations,* may have against the United States." (Emphasis ours)

Thus, it is seen that the court's jurisdiction in that case was confined solely and entirely to claims *arising under treaty stipulations* and not to claims growing out of *the Agreement of 1891,* nor to a consideration of interest rests provided for in such Agreement.

The object of the jurisdictional act was to restore to the Cherokees the right which they had under the 4th Section of the Agreement of 1891,

> "to enter suit against the United States in the Court of Claims, with the right of appeal to the Supreme Court of the United States by either party, for any alleged amount of money promised but withheld by the United States from the Cherokee Nation, under any of said treaties or laws."

and which right the Cherokees lost as pointed out in the decisions of the courts through their acceptance of the account as rendered.

In any event, the Act was so construed by the Attor-

neys for nowhere in the numerous briefs filed in the case and in the several opinions of the courts, is this question of interest rests referred to.

It is respectfully submitted that the entire theory of the opinion on this question of a rest for interest is predicated on the use of the words, "Until paid", which words did not appear in the Slade and Bender account anywhere at any time. It is admitted that as a general rule, it is customary to use the words, "until paid" in fixing the time interest shall run when no definite time has been fixed. The customary use of these words, in this sense, has become so completely established as, no doubt, to cause their above use in the opinion.

And these are the precise words which Slade and Bender and the parties to the Agreement would have used had they had in mind any such meaning as that expressed in the opinion. But as expressing the complete meaning of the parties when referring to the running of interest, the very significant phrase, *"to date of payment"* was used. (R. 17.)

Now, what is the reason for the use of this very significant phrase, *"To date of payment"*, instead of the more simple and customary words, *"until paid"*? The answer is very simple. The use of the phrase, *"to date of payment"*, was deliberate and for a purpose and in accordance with the Agreement of 1891, which provides that after the account shall have been rendered and accepted by the parties, the amount due shall be appropriated by Congress, "if then in session, and if not, then at the session immediately following such accounting." (27 Stat. 640.) Thus under the Agreement, whilst the time of payment was provided for, no exact date was fixed. Hence, the account prepared,

rendered and accepted under this agreement provided that interest should run, *"to date of payment"*, which was provided in the Agreement to be during the Session of Congress when "it shall be found upon such accounting that any sum of money has been so withheld", or in case of suit when favorable judgment was rendered, and in any event, not later than the end of the succeeding Congress. The Court of Claims found, affirmed by this court, that this exact date of payment was March 4, 1895.

Slade and Bender, who prepared the Government's account and the parties who accepted it were all intelligent men, and familiar with the customary use of the phrase, "Until paid" and their not using this customary and universally used phrase indicates, in no unmistakable manner, that the parties intended the language used in this account to mean that the Items contained therein should, under the terms of the account, carry interest "to date of payment" which date was provided for and fixed under the Agreement.

According to the theory of the opinion, Slade and Bender in the preparation of the account could go no further.

Furthermore, the use in the account of this very significant phrase, "to date of payment", and the acceptance by the Cherokees in 1894, of the account, without question, with this phrase in it, makes it a part, as it were, of the *res gestæ of the transaction,* as not only fixing the interest rest but as an interpretation by the parties of the effect of the provisions of the treaties, etc., relating to interest-bearing trust funds as applied to the account, as well as to the application of the interest provision of the Agreement of 1891, and the amounts admitted by the Government to be due in case

they were not paid at the time fixed in the Agreement. In which event it was recognized that the total amount due at the *"date of payment"* would under the provisions, of the treaties, etc., and the Agreement of 1891, bear interest at 5%.

When the Cherokees accepted and agreed to the Account, December 1, 1894, and demanded payment, the "date of payment" became certain as on or before March 4, 1895 and not after that date. The phrase, "until paid" would not have completely expressed the intention of and meaning of the parties. "To date of payment" did so.

Had there been any other intention or construction of the parties, the familiar phrase, "until paid," would have been adopted in the Government's account.

If, as the opinion says, (Page 9)

> "by the ratification of their report (Slade and Bender) by both parties, interest thus calculated becomes a stipulated term in respect of the issue before us."

Then the use of the phrase, "to date of payment," in the Government's account, makes it a stipulation, in support of the contention of the Cherokees that an interest rest was provided for, from and after which time the total amount remaining due and unpaid should bear interest at 5%.

With deep regret, counsel must admit that but for the fact, that counsel did not have an opportunity to fully reply to the Solicitor's brief where this substitution of the words, "until paid", for the significant words, "to date of payment", first appears, doubtless, the Cherokees would not have been made to suffer from the effects of this grave error in the opinion which says that the Cherokees were bound by their

acceptance of the government's account or so-called Slade and Bender report, containing these words, "until paid", for the simple reason that this account contains no such phrase or words for which reason the Cherokees could not have accepted the account as meaning any such thing. The evidence is clear that they then construed the words actually used in the account, "to date of payment", to mean just what they are now contending for.

Likewise, the Court of Claims, in 1905, adopted the phrase, "to date of payment", as used in the Government's account and the Cherokees accepted this as a recognition, so far as the Court could go under the jurisdictional act, of the contention of the Cherokees that under the Agreement of 1891, there was an interest rest on March 4, 1895, and they so contended, which led to the incorporation of the provision in the Act of 1906, making appropriation to satisfy the judgment,

> "Together with such additional sum as may be necessary to pay interest as authorized by law." (34 Stat. 664.)

If, however, the court then was in error in using the phrase, "to date of payment", it went no further, for this court on page 10 of the opinion says:

> "The court then proceeded to find the interest due as directed in the Slade and Bender account without any suggestion of a rest for interest in 1905."

Furthermore, under the present jurisdictional act, this court has full authority to correct such error, for it is therein provided that jurisdiction is hereby conferred to consider and determine "the claim of the Cherokee Nation against the United States for interest in addition to all other interest heretofore allowed and paid, al-

leged to be owing from the United States to the Cherokee Nation on the funds arising from the judgment of the Court of Claims of May 18, 1905," (40 Stat. 1316).

Certainly, this is a claim:

> "for interest in addition to all other interest heretofore allowed and paid, alleged to be owing from the United States to the Cherokee Nation on the funds *arising from the judgment* of the Court of Claims of May 18, 1906." (Emphasis ours.)

It is further regretted that the Cherokees are made to suffer from an evident misunderstanding, as shown in the opinion of the Cherokees' contention that:

V.

The Cherokees are entitled to recover interest from March 4, 1895, under the Act of September 11, 1841, and the treaty of July 19, 1866, on the amount of each of the several items of the Government's account, 1, 2, 3 and 4, as interest bearing trust funds, these respective amounts having been admitted by the trustee to be due and payable to the Cherokees, and agreed to be paid March 4, 1895.

On page 11 and 12, the Opinion quotes from the Treaty of 1866, (14 Stat. at p. 805) and from the Act of 1841, (5 Stat. at p. 465) which provide that all trust funds, when not otherwise required by treaty, shall be invested in interest-bearing securities at not less than 5%. The opinion then says (page 12):

> "It is urged that the largest item of $1,114,000 was taken out of a $5,000,000 trust fund held by the United States for the benefit of the Cherokees

and therefore that it should be treated as if it were always in the Treasury of the United States held in trust for the Indians, and as if the United States had collected the interest thereon out of the invested stocks and had refused to pay it over as annuities to the Indians. This claim proves too much. It would require compound interest brought about by annual or semi-annual rests for near a century, an amount that the Solicitor General suggests would be equal to the National debt."

From this it is evident, that the contention on behalf of the Cherokees is entirely misunderstood. It is respectfully submitted that it is not contended that Item 2 or any of the other items were to be treated as if they,

> "were always in the Treasury of the United States held in trust for the Indians, and as if the United States had collected the interest thereon out of the invested stocks and had refused to pay it over as annuities to the Indians."

The misunderstanding seems to have arisen over the claim of the Cherokees, that the entire purchase price of the land should bear interest from March 4, 1895. In response to which it was contended for the Government that the money had not, upon that date, been actually paid into the Treasury as required by the statutes.

On page 11 of the Cherokee Reply Brief, it is said:

> "In response to which (the above contention) it is respectfully submitted that it does not lie in the mouth of this appellee to claim the advantage of its own wrong, besides, it is a familiar rule of Equity that Equity considers that as done which ought to have been done and therefore that the *purchase money* was potentially in the Treasury of the United States as a trust fund and ought to be treated as if invested for the benefit of the Indians at 5% interest."

It will be noted that it was a balance due as a part of the *purchase money* which it was claimed, on behalf of the Cherokees should be treated as if potentially in the Treasury of the United States, on the agreed, "date of payment", and nothing else but that balance, and at no other time except upon that date.

It is important to keep in mind that this court approved of the finding of the Court of Claims that the payment of this balance on the date which the courts fixed as March 4, 1895, constituted a part of the purchase price of the "thing sold and delivered".

The contention then, and now, is that the Agreement of 1891, as amended, which became effective on or before March 4, 1895, fixed a rest for interest as of March 4, 1895, and that the Government breached its contract by not appropriating the money to pay on that date, and that the money composing this item 2 and that composing the other three items should, whether appropriated for or not, be treated as if it were in the Treasury of the United States, as part of the trust funds of the Cherokees, on the date upon which it was agreed to be paid, namely March 4, 1895; that is, that it should be treated as if the money had been on this particular "date of payment", transferred on the books of the Treasury to the respective trust funds to which it belonged.

This date was claimed as a rest for interest for the reason that this Court had approved the finding of the Court of Claims that this date had been agreed upon as the "date of payment", of the amounts agreed to be due, such payment as held by these Courts being a part of the purchase money "for the thing sold and delivered".

The Treaty of 1866 and the Act of 1841 were re-

ferred to for the purpose of establishing, beyond any question, that the four items of the Government's account, being trust funds, bore interest. It was far from any thought of counsel that by referring to this treaty and this act it would be understood as expressing any such contention as is stated in the opinion. It is submitted, however, that a careful examination of this Act of 1841, and the Treaty of 1866, does establish beyond any doubt just what was claimed for the Cherokees; namely, that the amounts of these respective items were interest-bearing trust funds.

This brings us to a consideration of the exact question; as to whether the treaties creating these trust funds and the Acts of Congress, recognizing them as trust funds in the hands of the Government as trustee and providing for interest thereon at 5%, constitute "a contract expressly stipulating for the payment of interest", entitling the Cherokees to interest from 1895.

This question has been settled in favor of the Cherokees in the Blackfeather case when, in passing upon a question on all fours with the one raised here, the Court said:

> "The real question here is whether there was a contract expressly stipulating for the payment of interest, or is this a mere claim for unliquidated damages?
>
> "By the seventh article of the treaty, it was agreed that the proceeds of the lands, after making the several deductions, 'should constitute a fund for the future necessities of said tribe, parties to this compact, on which the United States agree to pay to the chiefs, for the use and general benefit of their people, annually, five per centum on the amount of said balance, as an annuity. Said fund to be continued during the pleasure of Con-

gress, unless the chiefs of the said tribes or band, by and with the consent of their people, in general council assembled, should desire that the fund thus to be created, should be dissolved and paid over to them.' While this is not literally an agreement to pay interest, it has substantially that effect. It is true it is called an annuity, but the amount of the annuity is measured by the interest paid upon funds held in trust by the United States. (Rev. Stat. § 3656) upon investments for Indians (§ 2096) as well as by the interest paid upon an affirmance by this court of judgments of the Court of Claims."

* * * * *

"While the treaty bound the government to pay a five per cent annuity until the dissolution of the fund, which dissolution took place September 28, 1852, when the sum of $37,180.58, the amount of the fund resulting from actual sales was paid over to the chiefs of the tribe, this dissolution terminated the stipulation for the annuity only *pro tanto. If the government had originally accounted for the whole amount for which the court below held it to be liable, it would have paid five per cent upon this amount until the whole fund was paid over."* (155 U. S. pp. 192, 193.) (Emphasis ours.)

But what, in this case, is "the whole amount", for which this Court has already held the Government to be liable? Obviously, the "whole amount" here involved is the liquidated amount stated and concededly due March 4, 1895.

Without in the least conceding that the liability of the Government does not fully rest upon the above grounds, it is contended that it also rests on the ground that:

VI.

The Cherokees are entitled to recover interest under the Agreement of 1891, from March 4, 1895, on the amount stated in the Government's account to be due and payable and conceded by the Government to be correct and held by the Courts to be due, the payment of which on March 4, 1895, as held by the Courts, constituted a part of the purchase price of the land theretofore ceded.

The question is, does the following provision of Section 6 of the Agreement of 1891 (27 Stat. 640) apply to the amounts found to be due, the payment of which, on March 4, 1895, constituted a part of the purchase price of the land:

"So long as the money or any part of it shall remain in the Treasury of the United States, after this Agreement shall have become effective, such sum so left in the Treasury of the United States shall bear interest at the rate of 5 per centum per annum, payable semi-annually."

On page 11, the opinion referring to this provision, says:

> "it did not and could not refer to amounts due on past accounts because at the time the agreement of 1891 was made they were not fixed in amount and awaited a possible adjudication to determine them and full treatment of them was given in Article 4 of the Agreement. The sixth Article did not apply to them at all."

With equal force it might be contended that an agreement made in advance to pay the *amount* found to be due by arbitrators, or of an umpire, would not be binding because the exact amount had not previously

been ascertained; or, likewise, that an agreement in advance to pay an amount so found due *on a certain date* could not be enforced; or that, an agreement made with a farmer before his wheat was cut to pay him $1.00 per bushel for it could not be binding because at the time the Agreement was made the number of bushels to be delivered "were not fixed in amount."

Again on page 11 the opinion says:

> "A careful examination of the sixth Article shows that this clause referred only to the new money consideration to be paid, and really only to the part of that which, after it fell due and was ready for payment, should be voluntarily left in the Treasury by the Cherokee Nation. It did not even refer to the originally deferred payments because those payments were to bear only four per cent."

The four per cent rate was set up in the Act of 1893 to enable the Cherokees to dispose of their government securities to National Banks at a premium. No sums were left in the Treasury. All were disposed of under the Act of 1893 as the opinion points out on page 4. Hence the interest-bearing provision of the Sixth Article could not apply to the new money. It must have applied to the "old accounts."

Furthermore, in the final "Articles of Agreement, made and concluded at Washington City, D. C., on the 17th day of May, 1893, between the parties, in which the cession of the Outlet was made, the Agreement of 1891, as amended by the Act of March 3, 1893, was quoted and this provision, as to interest at 5% on the amount left in the Treasury, was left in this final agreement with full force and vigor. Thus the significant fact appears that this provision as to 5% interest was

carried all the way through the Agreement without the slightest change being made regarding it, either in the Amendatory Act and Act of Acceptance of the United States of March 3, 1893, or in the Act of Acceptance and cession by the Cherokees. Finally in the deed of cession by the Cherokees, it was quoted verbatim, after everything to which it could be applied under the *Agreement* had been eliminated except the amount due under the accounting. How, then, could it be said that this interest provision was not intended to apply to these old accounts?

This is additional evidence as to why, in the preparation and adoption of the Government's account the phrase, "to date of payment", was used in providing for interest on the several items of the account and shows, unmistakably, that the parties who prepared and accepted the account intended that this 5% provision of the agreement as to interest would become effective upon the "date of payment", as provided to be fixed in the agreement, itself.

Agreement of 1891 shows on its face that the 5 per cent interest provision applies to the amounts conceded to be due in the account.

A careful examination of the 6th Section of the Agreement of 1891, shows, on its face, that the 5% interest provision was intended to apply to the amounts conceded to be due in the Government's account.

The Court's attention is respectfully invited to the use, in this provision, of the words, "the money." Now, to what did "the money" refer? Not to the so-called cash consideration and not alone to the money due on the so-called old accounts but to *all* the money to be paid under the agreement, "or any part of it," remain-

ing in the Treasury. Is it conceivable that the words, "the money", would have been used if they were intended to refer to the so-called cash consideration alone? The interest provision was not to apply until "after the agreement shall have become effective."

In the same sentence and immediately following that part of it which is in controversy comes the provision to prevent discrimination in the distribution, which provides: "that should the Cherokee Nation determine to distribute *said money* or any part thereof, principal or interest, to any of its citizens per capita", and complaint should be made that certain ones are being discriminated against, "The United States shall retain a sufficient sum of *such money* in its control to adjust and relieve such discrimination."

To what does *"such money"*, used in this part of the sentence apply? Not to the so-called cash consideration alone, nor to the amount due on the so-called old accounts alone but to all, "the money", supposed to be paid under the Agreement;—to all the money and not to a part of it, for it was all the money, both the cash consideration and the proceeds of the so-called old accounts which was to be distributed and not one part of it only.

Therefore, there is no escape from the conclusion that the words, *"the money"*, and *"such money"*, used in this sentence, in the first part as well as in the second part, referred to one and the same thing, namely, to all the money to be received under the Agreement. This indicates, beyond question, that the parties to the Agreement intended that this interest provision as well as the provision for the distribution of the money, both belonging to the same sentence and being immediately connected parts thereof, should apply alike to all

the money contemplated to be paid under the Agreement.

But the parties did not stop with the original Agreement in the use of these two connected clauses of the same sentence but incorporated them in the amended Agreement of March 3, 1893, and finally in the deed of cession of May 17, 1893.

Thus, the parties to the Agreement indicated their own interpretation of their own language, "the money so left in the Treasury of the United States shall bear interest at the rate of 5 per centum per annum," as used in the first part of the sentence, as applying to all the money received under the Agreement.

All authorities are united on the proposition that the interpretation given by the parties to the language used in their Agreement is to be followed. However,

If the language used is of doubtful meaning the doubt is to be resolved in favor of the Cherokees.

It seems to be conceded by the Solicitor, as also determined by the Court of Claims, that at least the meaning of the expression, "the money," as used in the 6th paragraph of the agreement of 1891, is doubtful. If this is the correct view then we submit that this Court has for more than one hundred years followed the principle that when the terms of a treaty with an Indian tribe is of doubtful meaning that such doubt should be resolved in favor of the tribe. *Worcester* v. *Georgia,* 6 Pet. 515; *U. S.* v. *Choctaw Nation,* 179 U. S., 494; *The Kansas Indians,* 5 Wall. 137, *U. S.* v. *Kagama,* 118 U. S. 375; *Choctaw Nation* v. *U. S.* 119 U. S. 1; *Jones* v. *Meehan,* 175 U. S. 1.

The Court of Claims said:

"At the time of this negotiation the Cherokees

had a grievance against the United States—a grievance which had burned in the breasts of two generations, and had never been forgiven or forgotten. * * *

"Interpreted in the light of the long, sore controversy which had existed between the parties, it is plain that the Cherokees believed the agreement to mean (and the United States allowed them to so believe) that all of their claims and rights and equities were to be reopened and re-examined *de novo;* and that upon the faith of that belief they made a cession of the Outlet." (202 U. S. 121; 40 C. Cl. 322.)

Credulity is staggered at the suggestion that these Cherokees who, for more than a half of a century, had been waging this bitter controversy over the non-payment of the money they claimed to be due them, would under such circumstances, consent to the insertion of a provision in the agreement which provided for the settlement of their old claims in part consideration for the cession of their lands without their understanding and believing that in case of non-payment of the amounts found due, such amounts should bear interest from the agreed date of payment; especially since, as was so truthfully said in the opinion in the instant case, at the bottom of page 8:

"We have already held, in *The Old Settlers* case, *supra,* and in *United States* vs. *The Cherokee Nation, supra,* that in the past financial dealings between the United States and the Cherokee on debts due from the former to the latter, interest at five per cent. until payment was to be allowed as if stipulated."

If this had been the established policy, can it be imagined that the Cherokees did not understand that

the 5% provision in the Agreement of 1891, applied to the entire purchase price of the land, including the amounts which might be found to be due in accordance with the provision of the Agreement of 1891, on the old accounts.

Congress not only recognized that the Cherokees understood that the interest provision of the agreement applied to all funds but indicated that it also so understood it.

When the present jurisdictional act was passed, Congress not only recognized that the Cherokees understood that the 5% provision of the Agreement applied to all funds they were supposed to receive under the Agreement but in the passage of the act, Congress indicated that it also so understood this provision.

In the lower court, counsel for the government, at page 170, quotes from the report of the Committee (Report No. 266, 65th Cong. 2nd Session) accompanying H. R. 357, which became the present Jurisdictional Act. That quotation is as follows:

> "On behalf of the Cherokee Nation a *prima facie* showing has been made indicating that the Cherokees may possibly be rightfully entitled to the payment of additional interest on all four of the funds *which arose from said judgment.*" (Italics ours.)

From this language, it was then contended that Congress could not have had in mind the fact that the Cherokees were claiming, or were entitled to receive, any interest accruing prior to the judgment. But counsel failed to quote the really pertinent language of the report. This report after reciting the pro-

vision of clause 6 of Article II of the Agreement of 1891, providing for interest at 5 per cent, "so long as the money or any part thereof remains in the Treasury of the United States," says (p. 2):

> "Because of these opinions of the Court of Claims and of the Supreme Court and this stipulation as to interest, it is contended on behalf of the Cherokee Nation that the United States are liable to pay interest on all four of the respective funds *arising from* the said judgment from the time the said agreement became effective until they shall have been actually withdrawn from or taken out of the Treasury of the United States and paid to the Cherokees.
>
> "June 30, 1906, by an item in the general deficiency appropriation act of that year, Congress appropriated the money to pay the said judgment 'with interest upon the several items of judgment at 5 per cent * * *, together with such additional sum as may be necessary to pay interest as authorized by law.'" (34 Stat. L., p. 664)" (Italics ours.)

With this report before it, Congress expressed its approval by passing the present jurisdictional act. It thus expressly recognized that the Cherokee's contention as to the application of the interest-bearing provision was not without foundation. It follows that the Sixth Article was not so unambiguous as to be free from doubt, as to its meaning.

No inconsistency in the contention that the Cherokees are entitled to interest after March 4, 1895, on the aggregate of principal and interest of the four respective interest-bearing trust fund items of the Government's account and the contention that the 5% interest provision of the Agreement of 1891 applied to the aggregate of the same items from the same date.

At the time the Agreement was entered into, the Cherokees had a number of other claims than the 4 items allowed in the Government's account which they expected to present and did present for consideration and which were disallowed.

> "a number of demands made by the Cherokee Nation were disallowed and the result of the finding is submitted in the following schedule from the Slade and Bender report." (Finding XX, 40 C. Cls., at p. 295.)

Therefore, it was impossible to determine in advance, whether under the proposed plan of settlement, the claims which would be allowed would apply to interest-bearing trust funds or not, hence the necessity for a general interest-bearing provision in the Agreement which would apply and which, doubtless, was intended to apply to all, "the money," the Cherokees were entitled to receive on the date, "this agreement shall have become effective," whether non-interest-bearing funds or interest-bearing trust funds.

It is earnestly urged that in view of all the foregoing, the contention here made that the provision in the Agreement that, "so long as *the money* (emphasis ours) or any part of it shall remain in the Treasury of the United States after this agreement shall have become effective, such sum "shall bear interest at 5%" is applicable to and was intended to be applicable to all, "the money," and not to a part of it which the Cherokees were supposed to receive under the Agreement on or before the date the Agreement became effective, presents the only, consistent, logical, just, and equitable view of the question possible.

VII.

Issue that the Cherokees were over-paid not raised by the pleadings and for the first time by Solicitor's brief filed after case was on call for argument; and the Cherokees were considerably under-paid and not over-paid as erroneously asserted by the Solicitor.

The opinion at page 15 says:

> "The Solicitor General in his brief makes it evident that in the case of no one of the four items is the amount which has been actually paid less than that which should have been paid down to the day of payment, in accordance with the judgment, including the principal and 5 per cent simple interest to the date of payment. There is no attempt on the part of the appellant to question the demonstration of this fact."

It is evident from this statement that the opinion accepted without question this assertion of the Solicitor that the Cherokees had been over-paid as correct when but a casual examination of the decrees and s ttlements will show that this assertion is entirely erroneous. The Solicitor never attempted to demonstrate this fact and we challenge his ability to do so. We respectfully submit that this assertion is not supported by the facts as will be disclosed by the records upon an examination in the case.

The reason there was no attempt on the part of the Appellant to question this assertion as has heretofore been stated, is because the issue was not raised in the pleading and was raised for the first time in the Solicitor's brief filed after the case was on call for argument and it was then found that he had made an entire change in his defense from that before the

lower court and counsel were thereby unable to make adequate reply to the many erroneous statements and misconstructions of the Cherokees' contention contained in the Solicitor's brief and through a mistake, counsel who was to call attention to these matters on oral argument was prevented from doing so.

Further, it is most respectfully urged that if this erroneous assertion of the Solicitor which the opinion has followed is allowed to stand, it will work irreparable injury to the Cherokees not only as an act of grave injustice but will result in an actual financial loss of several thousand dollars.

In a recent jurisdictional act, Congress provided for a general accounting by the Government to the Cherokees of all their claims with the provision that the Government might apply such counter claims or set offs as it may have against the Cherokees and if this erroneous assertion of the Solicitor is permitted to stand, with the sanction of this court, it will undoubtedly be allowed against the Cherokees in any future settlement. That this court will not permit such an injustice to be done, whether great or small, needs not to be stated.

The court's attention is most respectfully invited to a consideration of the following statement which it is respectfully submitted, completely answers one of the many erroneous assertions contained in the Solicitor's brief. This statement is based upon the theory on which the Solicitor claims the payments should have been made.

ITEM 1

Principal due Feb. 27, 1819.....	$	2,125.00
Interest @ 5% to July 2, 1906, 87 years, 125 days.....		9,280.14
		$11,405.14
Under settlement made by Treasury, in which 4% on the amount of this item from December 29, 1905 (date transcript of judgment was filed) to May 14, 1906 (date of Supreme Court's Mandate) was included, there was paid to the Secretary of the Interior, July 2, 1906.....		11,520.46

"in trust for the Cherokee Nation" to be "credited on the proper books of account to the principal of the Cherokee 'School Fund,' " then "in the possession of the United States and held by them as trustees." Quotations are from the decision of the Court.)

As to this item, according to the opinion of April 12, 1926, there would thus appear an overpayment of $115.32 which has, however, not been mentioned heretofore. This is something new and while the figures, all appear in the record, from which correct conclusions may be easily reached, the contention that the Cherokees have been over-paid was not made in the pleadings and as a fact is not proven by the figures themselves, on the aggregate of the 4 items.

ITEM 2

Principal due June 12, 1838.....	$1,111,284.70
Interest at 5% to March 15, 1910.....	3,987,076.38
Total (being the amount paid) (R. p. 23, Finding VIII).....	$5,098,361.08

(See Finding VIII R. p. 21.)

This amount of $5,098,361.08 represents the original principal sum of Item 2, plus simple interest thereon from June 12, 1838, to the day it was paid to the Cherokees, March 15, 1910. There certainly was not any over-payment here, but on the other hand payment was made exactly as the opinion of April 12, 1926, says it should have been made.

Why the Court of Claims in its finding (VIII) as to Item 2 referred at all to any interest at 4% is without explanation because no such interest was allowed or paid to the Cherokees. Simple calculation by multiplication shows that the total amount paid on account of this item (2) was $1,111,284.70 (the original principal) with simple interest thereon from June 12, 1838, till paid.

However, there was an error made by the Accounting officers of the Treasury Department by which some $6,754.91 were erroneously paid to Attorneys, contrary to and in the face of the judgment of the Court of Claims.

Under the judgment of May 28, 1906, the attorneys were entitled to receive out of Item 2, 15% on $1,111,284.70 plus interest at 5% from June 12, 1838, to July 14, 1906 (date of payment to Attorneys).....	734,178.61

On July 14, 1906, the attorneys were paid		740,555.42
Making an over payment to attorneys, taken from Cherokee money without authority of law		6,374.81
This sum having been taken from the money due the Cherokees represents underpayment to them in that amount.		
On November 3, 1906, another set of attorneys were paid, out of the proceeds of the judgment of 1906, the sum of	$	149,324.80
Assuming that the theory now stated in the opinion is the correct one, and making arithmetical calculations from the figures in the record, it will appear that they, the said attorneys were entitled, not to		149,324.80
but to only		148,944.70
Making an overcharge against the Cherokees (*i.e.* underpayment to them) of		380.10

ITEM 3

Principal due January 1, 1874.....	$	432.28
The record shows (page 22) that the total amount that has been paid on account of this item is.....		1,140.49
This was paid July 2, 1906. On that day, according to the theory now stated in the opinion, there was due $432.28 with 5% simple interest thereon from January 1, 1874, to July 2, 1906, or.....		1,134.71
Difference		5.78
There would thus appear to have been $5.78 too much paid on that day. However, the record also shows on its face that no interest has been allowed on this fund since July 2, 1906. It is a trust fund, proceeds of Cherokee land sold by the Government, and is entitled to 5% interest under the treaties (1835 and 1846) and under the Acts of Congress.		
The fund is still in the Treasury, and there is, due and unpaid 20 years interest thereon which amounts to....		1,134.71

ITEM 4

Principal due July 1, 1893.....	$ 20,406.25
Because of a clerical error made by the Clerk of the Court of Claims, afterwards corrected by special Act of Congress, the accounts relating to the payment of this item and interest thereon are rather complicated. However, taking the figures, all being in the record, using simple addition and multiplication and taking the date of payment as July 2, 1906, as the date as of which this item, both principal and accrued interest should be added to the principal of the Cherokee National Fund, a 5% interest-bearing trust fund (See Decree May 28, 1906, carrying out Mandate of this Court) the following results:	
The total paid on account of this item, as of July 2, 1906, under the judgment and all acts of Congress passed since that date amounts to.....	33,650.09
The amount due as of that date on the theory now stated in the opinion is	33,673.11
Underpayment to the Cherokees, balance	23.02

RECAPITULATION OF ITEMS

	Over-Payment	*Under-Payment*
Item 1	$115.32	
Item 2		$6,754.91
Item 3		1,128.93
Item 4		23.02
Totals	$115.32	$7,906.86
		115.32
Balance underpaid...		$7,791.54

Thus it appears from the above that the Cherokees, instead of being over-paid have been underpaid in a very considerable amount, all of which your petitioners will completely substantiate if their prayer for re-hearing is granted.

VIII.

In any event the Cherokees are entitled to interest at 5% per annum on the respective amounts, principals and interest, of Item 3 and 2 of the judgment of 1906 from July 2, 1906, the date said amounts were paid to the Secretary of the Interior in trust for the Cherokees.

The prayer of the Petitioner asks judgment not only for interest calculated on the theory that the appellant is entitled to interest at 5% from March 4, 1895, on the aggregate, principal and interest, found due, but "for such additional and other sums as may be necessary to pay for further or any other interests authorized by law." (R. p. 10.)

The Cherokees claim that at the date of payment to their trustee of the final judgment, 1906, the respective aggregates, principals and interest, of the four items of said judgment were interest-bearing trust funds in the Treasury of the United States and:

First: That it was provided in the treaties and Acts of Congress relating to the funds which were the subject of the four items of the judgment that such funds as the aggregate of principal and interest of these respective items should bear interest at 5% from the date of payment of the judgment;

Second: That the Agreement as finally ratified, March 3, 1893, also expressly provided that said funds should bear interest at 5% from the date the Agree-

ment became effective, and which could not have been later than the date of judgment.

We respectfully submit that at least after the date of payment of the judgment these funds which were, in effect, improperly withdrawn (and misappropriated) from the trust funds held by the United States for the Cherokees, with interest as well as the principal, were constructively restored to the funds from which they were taken and so long as they remained in the Treasury of the United States, the Cherokees are entitled to interest thereon at 5%.

It is respectfully submitted that two of these items, 1 and 4, were so treated under the judgment and that in principle the other two items, 2 and 3, should now be so treated under the express direction of this court.

Items 1 and 4 were expressly described in the former decree of the Court of Claims (40 Ct. Cl. 252, 364), as constituting *trust* funds and as constituting such funds after principal and accumulated interest had been aggregated. This Court's statement on page 15 that the computation and payment of interest at five per cent on these aggregate amounts was a mistake, is, it is submitted, erroneous in view of the prior decree.

On page 15 of the opinion herein appears the following:

> "A further mistake was made in calculating interest at 5% after the date of affirmance by this Court, on the total of the judgment and the interest until final payment."

We confess that we are unable clearly to understand this statement in the light of facts appearing in the record in the instant case and in the former case. We respectfully submit no such interest as indicated, appears to have been paid, or has been paid, on the

amounts, of the funds represented by Items 2 and 3 of the judgment of 1906. As to Items 1 and 4 of the judgment, the decree itself, affirmed by this court in 1906, directs as follows:

As to Item 1:

> "The sum of $2,125, with interest thereon at the rate of 5 per cent from February 27, 1819, to date of payment." * * * "Shall be paid to the Secretary of the Interior in trust for the Cherokee Nation and shall be credited on the proper books of account to the principal of the 'Cherokee School Fund' now in the possession of the United States and held by them as trustees."

As to Item 4:

> "The sum of $20,406.25 with interest" * * * "shall be paid to the Secretary of the Interior and credited on the proper books of account to the principal of the 'Cherokee National Fund.'" (40 C. Cls. 252 at page 364.)

The principals of these funds, the "School fund" and the "National fund," are each 5% interest bearing, not at all under or by virtue of the resolution of the Senate of September, 1850, but by force of treaty stipulations and acts of Congress fulfilling same (see treaty of 1835—article 10; Treaty of 1866, 14 Stat. 799, 805; Act of Congress of 1880, 21 Stat. 70). Interest at 5% per annum has been paid on the amounts of these funds, Item 1 and 4, from July 2, 1906, the day said amounts were added, in obedience to the judgment and decree of court, to the principals, respectively, of the "School fund" and the "National fund".

If granted a rehearing, the appellant, the Cherokee Nation, will clearly show from the record herein and in the former case:

1. That the fund represented by Item 3 of the judgment of 1906 ($1,140.49) paid to the Secretary of the Interior July 2, 1906, in trust for the Cherokee Nation, less $34.25 paid to attorneys November 3, 1906, has been held by the Secretary in the Treasury of the United States since that date *without interest.*

a. That said fund arose from proceeds of sale of Cherokee trust lands; and that such money, expressly as stipulated by treaty (article 23, treaty of 1866), belongs to the Cherokee "National School" and "Orphan" 5% interest-bearing trust funds.

b. That there is due the Cherokee Nation interest at 5% per annum on said fund ($1,140.49) from July 2, 1906, less the sum of $34.25 paid attorneys, November 3, 1906.

2. That the fund represented by Item 2 of the judgment of 1906, principal and interest, amounting to $4,937,036.16, was paid to the Secretary of the Interior in trust for the Cherokees July 2, 1906; that it was from said date an active fund from which large sums were paid on a percentage basis and otherwise ($740,555.42 on July 14, 1906; $148,245.15 on November 3, 1906, to attorneys; approximately $50,000.00 on account of certain expenses prior to 1909) that said fund was held by the Secretary *without interest* during said time; that when said amount was paid to the Secretary, although before that time it may have been described as a certain principal sum with interest thereon, it was thereafter an indivisible "fund" known as "Item 2" of the judgment and being the balance unpaid of the $5,000,000.00 trust fund due the Eastern Cherokees under the Treaty of 1835, with interest at 5% per annum until paid; that in 1909, with full knowledge of the *amount* of this fund (Item 2 of the

judgment) while being held without interest in the Treasury of the United States, and payments being made therefrom, Congress directed that interest should be allowed and paid thereon up to the time of actual delivery of the money to the Cherokee beneficiaries. This interest, on the amount, was not and has not been paid.

We respectfully submit that the Cherokee Nation is entitled to interest on this $4,937,036.16 balance unpaid of the $5,000,000.00 treaty fund, paid to the Secretary of the Interior in trust for it, July 2, 1906, from said date, at 5% per annum, less lawful payments since made thereon.

Wherefore, your Petitioners respectfully pray that a re-hearing be granted herein.

FRANK J. BOUDINOT,
Attorney of Record.

JOHN W. DAVIS,
C. C. CALHOUN,
WILFRED HEARN,
LESLIE C. GARNETT,
Of Counsel.

We hereby certify that in our opinion the foregoing petition for rehearing is well founded in law, and that the same is filed in good faith and not for the purpose of delay.

JOHN W. DAVIS,
C. C. CALHOUN.

INDEX

AUTHORITIES CITED

In the Supreme Court of the United States

OCTOBER TERM, 1925

No. 198

THE CHEROKEE NATION, APPELLANT

v.

THE UNITED STATES

APPEAL FROM THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

PREVIOUS OPINIONS IN THE CASE

This is an appeal from the judgment of the Court of Claims (R. 27) reported in 59 Ct. Cls. 862. Prior judgments in a case dealing with the same questions are reported in 40 Ct. Cls. 252, and, on appeal, in 202 U. S. 101.

JURISDICTION

The judgment to be reviewed is that of the Court of Claims of June 23, 1924, dismissing the petition. The judgment appears on page 27 of the Record. The Cherokee Nation filed its application for appeal on September 19, 1924, under the provisions of the special jurisdictional Act of March 3, 1919

(Chap. 103, 40 Stat. 1316), (set forth at page 23 of this brief), which application was allowed by the court below on October 13, 1924. (R. 27.)

THE QUESTIONS INVOLVED

The controversy here is largely over the question whether the United States should pay the Cherokee Nation compound interest on certain obligations of the United States to the Indians, the payment of which was delayed.

In 1891 the United States agreed to submit a statement of certain sums alleged to be owing from it to the Indians, and, if the Indians accepted the statement, to appropriate and pay the amount shown on the statement before the end of the next session of Congress. The statement was rendered and showed there was owing to the Cherokee Nation certain principal items and interest thereon "until paid." This was approved by the Indians and Congress should have appropriated the necessary funds by March 4, 1895, but did not do so until some years later.

The Cherokee Nation contends that on failure to make the payments by March 4, 1895, the principal and accrued interest to date of default should have been added together to form a new principal sum, on which interest should thereafter have been computed.

The United States contends that upon its failure to pay on March 4, 1895, its obligation, as before, was to pay the principal items with simple interest

thereon until such principal items were paid, and that no compounding of interest is justified.

It appears also that in 1905 a judgment was rendered in the Court of Claims in favor of the Cherokee Nation and against the United States providing for the payment of the principal items above mentioned, with interest thereon *until paid,* at the rate of 5 per cent per annum. The correctness of this judgment is being reexamined here under authority of an Act of Congress; but assuming that the judgment was correct, in providing only for simple interest up to the date of the judgment, not compounded as of March 4, 1895, the Cherokee Nation further contends that the amount of the principal items, with simple interest to the date of the judgment, should have been treated as a new principal sum as of the date of the judgment upon which interest should thereafter have been compounded.

The United States contends that the judgment was not for a lump sum, but expressly provided for the payment of the principal items with simple interest thereon at the rate of 5 per cent per annum until the principal items were paid, thus directing the manner and rate of computation of interest subsequent to the date of the judgment, and that the amounts actually paid by the United States in satisfaction of the judgment equalled or exceeded the amount required to be paid by the terms of the judgment.

STATEMENT

The controversy between the Cherokee Indians and the United States as to what, if any, amounts were owing from one to the other has been rather extended, and some details thereof have been twice considered by this Court. In the case of *United States* v. *Old Settlers,* 148 U. S. 427, the claims of the Old Settlers or the Western Cherokees were considered, and in the case of *United States* v. *Cherokee Nation,* 202 U. S. 101, the claims of the Cherokee Nation as a whole, including Eastern and Western branches, were given full and careful consideration. The reports of these cases as well as the report in the Court of Claims of the decision in the case of the *Cherokee Nation* v. *United States* (40 Ct. Cls. 252, affirmed 202 U. S. 101) give a detailed statement of the transactions between the United States and the Cherokee Nation. It is not necessary for a proper presentation of the case at bar to go into a detailed discussion of such facts, but a summary will be sufficient and will prove helpful.

History of relations between the Cherokee Nation and the United States leading to the present controversy

Prior to 1808, the Cherokee Nation occupied lands in certain southeastern states of the United States, especially Florida, Georgia, Alabama, the Carolinas, and Tennessee. Part of the Nation wished to remain and engage in agricultural and other civilized pursuits, while another part desired

to continue as hunters and to follow their previous habits. The difference was taken up with the President of the United States, and he advised that the United States would consider and treat as neighbors those who wished to remain in the East, and that those who wished to continue as hunters should send an exploring party into the unoccupied lands in the Western part of the United States and select their future home. (40 C. Cls. 255, 256.) The exploring party was sent, and lands in what is now the State of Arkansas were selected. The Treaty of 1817 (7 Stat. 156) was entered into, which in substance provided that the Cherokees should cede certain lands in the East to the United States, the amount thereof to be determined with regard to the total lands occupied by the Cherokee Nation and the number of Cherokees emigrating to the West and the number remaining in the East. It was further provided that the United States should grant lands of equal area in the West to those ceded by the Cherokees in the East. There were also other provisions concerning the removal of the Cherokees, and certain payments to be made, which are not necessary here to consider.

In 1819 another treaty was entered into between the Cherokees and the United States (7 Stat. 195) to settle questions arising out of the Treaty of 1817. In the Treaty of 1819 it was estimated that about one-third of all of the Cherokees had emigrated to the West.

In 1828 (7 Stat. 311) a treaty was entered into between the Western Cherokees, or those who had emigrated West, and the United States, by which it was provided, among other things, that the Cherokees should release the lands in Arkansas, and in lieu thereof should be given a tract of approximately 7,000,000 acres in what is now Oklahoma, together with an outlet to the West. This outlet was thereafter known as the Cherokee Outlet. Certain payments by the United States were also provided for in this treaty, which it is not necessary here to consider. The Western Cherokees moved to the new lands provided for in said treaty, and the payments specified therein were made by the United States. (40 C. Cls. 262.)

By a treaty in 1833 (7 Stat. 414) the boundaries of the properties granted in the Treaty of 1828 were more definitely fixed and limited.

In February, 1835, a delegation of the Eastern Cherokees having authority to make a treaty agreed with the United States to submit to the Senate the question of how much should be paid for their claims and for a cession of their lands east of the Mississippi River. In March, 1835, the Senate, by resolution, advised that a sum not exceeding $5,000,000 should be paid. The Cherokee delegation then refused to submit propositions looking to a treaty in accordance with such sum. (40 C. Cls. 263.) At about the same time another delegation, representing only a portion of the Eastern Cherokees, negotiated for a treaty, and

submitted the results thereof to the Cherokee Nation, where it was rejected upon the ground that it was proposed to deduct from the $5,000,000 the cost of the removal of the Indians. (40 C. Cls. 263, 264.)

In December, 1835, a treaty between the Cherokees and the United States was entered into. Neither the Western Cherokees (or Old Settlers), nor the great body of the Eastern Cherokees were parties thereto, and they often repudiated same. This was known as the Treaty of New Echota. (40 Ct. Cls. 265.) Such treaty (7 Stat. 478) provided, among other things, for the cession of the Cherokee lands in the East to the United States, and for a release of all claims, the United States to pay $5,000,000. The United States agreed to remove the Eastern Cherokees to the West and to provide a year's subsistence. It was also provided that the question of whether the Senate intended that said sum of $5,000,000 include payment for spoliations should be submitted to the Senate, and if no such allowance had been made then an additional $300,000 should be paid to the Indians for the same; that the United States should deduct certain claims it had against the Indians and removal and subsistence expense, and after such deductions and the investment in certain trust funds therein specified, the remainder of said $5,000,000 should be divided among the Eastern Cherokees; that the United States should grant an additional 800,000 acres in the West to the Cherokee Nation, for which there

should be deducted from the said sum of $5,000,000 the sum of $500,000.

When this Treaty of 1835 was adopted by the Senate in May of 1836 (7 Stat. 488) certain supplementary articles were adopted as a part thereof, and, among other things, it is therein provided that an additional sum of $600,000 should be allowed to the Cherokee Nation to pay for their removal to the new lands in the West and for spoliations. (40 Ct. Cls. 267, 268.)

However, only a few of the Eastern Cherokees removed as contemplated by such treaty. An effort to bring about their removal continued, until, in 1838, after they had been concentrated into camps by the military forces of the United States, they yielded to such superior force, and under their own leaders moved West. (40 C. Cls. 268, 269.) Prior to such removal certain leaders of the Cherokees asked that they be permitted to remove themselves, but at the expense of the United States, and at the request of the Secretary of War (40 C. Cls. 270) Congress, on June 12, 1838, appropriated over a million dollars for the payment for removal and subsistence, with the proviso that no part of the same should be deducted from the $5,000,000 fund. (Chap. 98, 5 Stat. 241, 242.) The United States actually paid for the removal of the Eastern Cherokees about $1,500,000, of which amount $1,111,284.70 was taken from the $5,000,000 fund contemplated by the Treaty of 1835. (40 C. Cls. 271.)

After the removal of the Eastern Cherokees, leaders of both the Eastern and Western Cherokees met, and on July 12, 1838, entered into an agreement for the uniting of the separate branches of such Nation. (40 C. Cls. 271, 272.)

Considerable strife existed between the Eastern and Western Cherokees over the control of the government of such Nation; the Western Cherokees contending that the Eastern Cherokees, coming to their country, must accept the existing form of their government, and the Eastern Cherokees, who greatly outnumbered the Old Settlers, insisting that a new government should be established, and by virtue of their greater numbers they would naturally control the same. (148 U. S. 443, 444; 40 C. Cls. 274.) Finally, out of all this difficulty, and in an effort to terminate the same, the Treaty of 1846 (9 Stat. 871) was made. This treaty in substance provided that its purpose was to restore peace and make final settlement, and to make all of the Cherokee Indians parties to the Treaty of New Echota (1835); that the lands granted by the United States in the Treaty of 1828, as well as the 800,000 additional acres purchased from the United States under the Treaty of 1835, should belong to the entire Cherokee Nation, and not to the Western Cherokees alone; that the $5,000,000 payment provided for in the Treaty of 1835 should be reimbursed by the United States for certain moneys theretofore improperly charged to said fund, in-

eluding payments made for improvements, spoliations, treaty expense, etc.; that both the Western lands of the Cherokees, together with all claims growing out of the Eastern lands of the Cherokees should belong to both the Eastern and Western Cherokees; that after deducting proper charges, expenses, etc., from the $5,600,000 fund created by the Treaty of 1835 and the subsequent Act of Congress making appropriation of $600,000, one-third of the fund so remaining should be distributed per capita among the Western Cherokees known as the Old Settlers, the Old Settlers to release to the United States all their claims to the Eastern lands, and to agree that the lands in the West, including therein the 800,000 additional acres purchased by the Indians, and the Cherokee Outlet, should be the common property of all the Cherokee Indians. It was also provided that the United States would make a settlement of all moneys due the Cherokees, and that the question of whether the year's subsistence paid by the United States for the Eastern Cherokees after their arrival in the West, should be charged to the treaty fund "*and also the question, whether the Cherokee Nation shall be allowed interest on whatever sum may be found to be due the nation, and from what date and at what rate per annum*" (Italics ours) should be submitted to the Senate of the United States for its decision.

The Senate, by resolution of September 5, 1850 (Senate Journal, 31st Congress, 1st Session, p.

602), determined that the subsistence should be paid by the United States, and

> Resolved, That it is the sense of the Senate that interest at the rate of five per cent per annum should be allowed upon the sums found due to the Eastern and Western Cherokees, respectively, from the twelfth day of June, eighteen hundred and thirty-eight, until paid.

The accounting officers of the Government stated an account with the Cherokees in pursuance of the Treaty of 1846, in which it was determined that over $1,500,000 was due to the Cherokee Nation, one-third of which was distributable to the Western Cherokees, and Congress appropriated (9 Stat. 556) for such amount payable to the Western Cherokees, with interest thereon at 5% from June 12, 1838, and such sum was distributed to the Western Cherokees per capita. (40 C. Cls. 280.)

The accounting officers also stated an account with the Cherokee Indians which showed over $700,000 due to the Eastern Cherokees, and Congress also appropriated for the payment of that amount, with interest at 5% from June 12, 1838 (Chap. 91, 9 Stat. 544, 572, 573), which was paid and distributed to the Eastern Cherokees per capita and the final release required by the Appropriation Act was executed. (40 C. Cls. 281.)

The Cherokees continued to complain concerning the charging of the removal expense to the $5,000,000 treaty fund provided in the Treaty of

1835, and made other complaints concerning the accounts with the United States, and these complaints resulted in the Act of February 25, 1889 (Chap. 238, 25 Stat. 694), giving jurisdiction to the Court of Claims to determine the claims of the Old Settlers or Western Cherokees. The Court of Claims made a determination in such case, (27 C. Cls. 1) and on appeal this Court in substance affirmed the Courts of Claims (only slightly changing the amounts found by the Court of Claims). This resulted in the entry of a judgment in favor of the Old Settlers and against the United States in the sum of $212,376.94, with interest at the rate of 5% from June 12, 1838, to the date of the decree (148 U. S. 427), to which was added a further sum of $4,179.26; and upon such judgment the sum of $745,273.84 principal and interest was paid. (40 C. Cl. 287.)

FACTS OF THE PRESENT CONTROVERSY

Under the Act of Congress approved March 2, 1889 (Chap. 412, 25 Stat. 980, 1005), the President appointed commissioners to negotiate with the Cherokees for the cession to the United States of the lands in the Cherokee Outlet. (40 Ct. Cls. 288.) The Indians insisted that certain balances were due to them. After prolonged negotiations, on December 19, 1891, an agreement was made which provided for the cession to the United States by the Cherokees of the so-called Cherokee Outlet (R. 14), and also provided (R. 14–16):

"Article II. For and in consideration of the above cession and relinquishment the United States agrees:

* * * * *

" 'Fourth. The United States shall, without delay, render to the Cherokee Nation, through any agent appointed by authority of the national council, a complete account of moneys due the Cherokee Nation under any of the treaties ratified in the years 1817, 1819, 1825, 1828, 1833, 1835, 1836, 1846, 1866, and 1868, and any laws passed by Congress of the United States for the purpose of carrying said treaties, or any of them, into effect; and upon such accounting should the Cherokee Nation, by its national council, conclude and determine that such accounting is incorrect or unjust, then the Cherokee Nation shall have the right within twelve (12) months to enter suit against the United States in the Court of Claims, with the right of appeal to the Supreme Court of the United States by either party, for any alleged or declared amount of money promised but withheld by the United States from the Cherokee Nation, under any of said treaties or laws, which may be claimed to be omitted from or improperly or unjustly or illegally adjusted in said accounting; and the Congress of the United States shall at its next session, after such case shall be finally decided and certified to Congress according to law, appropriate a sufficient sum of money to pay such judgment to the Cherokee Nation, should judgment be rendered in her favor; or, if it shall be found

upon such accounting that any sum of money has been so withheld, the amount shall be duly appropriated by Congress, payable to the Cherokee Nation upon the order of its national council, such appropriation to be made by Congress if then in session, and if not, then at the session immediately following such accounting.

* * * * *

" ' Sixth. That in addition to the foregoing enumerated considerations for the cession and relinquishment of title to the lands hereinbefore provided the United States shall pay to the Cherokee Nation, at such time and in such manner as the Cherokee National Council shall determine, the sum of eight million five hundred and ninety-five thousand seven hundred and thirty-six and twelve one-hundredths ($8,595,736.12) dollars in excess of the sum of seven hundred and twenty-eight thousand three hundred and eighty-nine and forty-six one-hundredths ($728,389.46) dollars, the aggregate of amounts heretofore appropriated by Congress and charged against the lands of the Cherokees west of the Arkansas River, and also in excess of the amount heretofore paid by the Osage Indians for their reservation. So long as the money or any part of it shall remain in the Treasury of the United States after this agreement shall have become effective, such sum so left in the Treasury of the United States shall bear interest at the rate of five per centum per annum, payable

semi-annually: *Provided,* That the United States may at any time pay to said Cherokee Nation the whole or any part of said sum and thereupon terminate the obligation of the United States in respect to so much thereof as shall be so paid and in respect to any further interest upon the same * * *.

* * * * *

It is expressly understood that this agreement, ceding and relinquishing the title to the lands herein described, shall not be effective for any purpose whatever until it shall in its entirety be ratified by Congress and the amount of money herein agreed to be paid to the Cherokee Nation for such cession and relinquishment shall have been appropriated by Congress and placed in the Treasury of the United States subject to the order of the Cherokee National Council: *Provided further,* That nothing contained in this agreement shall have the effect to limit or impair any rights whatever the Cherokee Nation has in or to or over the lands herein ceded until it shall be so ratified by Congress: *And provided further,* That if this agreement shall not be ratified by Congress, and the appropriation of money, as herein provided for, made on or before March 4, 1893, it shall be utterly void.' "

This agreement was approved by the Cherokee Indians (R. 16) and by the United States by the Act of March 3, 1893 (Chap. 209, 27 Stat. 612, 640), which Act appropriated upon the cash consideration for the cession of the Cherokee Outlet of

$8,595,736.12, the sum of $295,736.00 to be immediately available, and the remaining sum of $8,300,000, or so much as is required to carry out the provisions of the said agreement as amended, and according to said Act, to be payable in five equal installments commencing on March 4, 1895, and ending on March 4, 1899, said deferred payments to bear interest at the rate of 4% per annum to be paid annually. The amount required for the payment of the interest was also appropriated. Said Act of March 3, 1893, also provided that the acceptance by the Cherokee Nation of any of the moneys so appropriated, should be considered as a ratification by them of the amendments to the agreement of 1891. The sum of $5,000 was appropriated to enable the Commissioner of Indian Affairs, under the direction of the Secretary of the Interior, to render a complete account as contemplated in the agreement of 1891. On May 17, 1893, a deed of cession was executed and delivered by the Cherokees to the United States, and the first installment of the purchase money was paid and accepted, and the United States took possession of the land. (R. 16.)

James A. Slade and Joseph T. Bender, two expert accountants, were employed by the United States to prepare the account provided for in the agreement of 1891. (R. 17.) And on April 28, 1894, they filed their account with the Secretary of the Interior, which account was as follows (R. 17):

Under the treaty of 1819:

Value of three tracts of land containing 1,700 acres, at $1.25 per acre, to be added to the principal of the "school" fund----------	$2,125.00
(With interest from Feb. 27, 1819, to date of payment.)	

Under the treaty of 1835:

Amount paid for removal of Eastern Cherokees to the Indian Territory, improperly charged to treaty fund----------	1,111,284.70
(With interest from June 12, 1838, to date of payment.)	

Under the treaty of 1866:

Amount received by receiver of public moneys at Independence, Kans., never credited to Cherokee Nation----------	432.28
(With interest from Jan. 1, 1874, to date of payment.)	

Under Act of Congress, March 3, 1893:

Interest on $15,000 of Choctaw funds applied in 1863 to relief of indigent Cherokees, said interest being improperly charged to Cherokee national fund----------	20,406.25
(With interest from July 1, 1893, to date of restoration of the principal of the Cherokee funds, held in trust in lieu of investments.)	

The Secretary of the Interior transmitted this account to the Cherokee Nation where it was approved on December 1, 1894, and was then transmitted by the Secretary to Congress on January 7, 1895. Congress, then in session, failed to make any appropriation to pay the amounts found due, and adjourned *sine die* on March 4, 1895. (R. 17.) No

action was taken by Congress upon the Slade and Bender account until by the Act of July 1, 1902 (Chap. 1375, 32 Stat. 716, 726) it was provided (R. 18):

> Jurisdiction is hereby conferred upon the Court of Claims to examine, consider, and adjudicate, with the right of appeal to the Supreme Court of the United States by any party in interest feeling aggrieved at the decision of the Court of Claims, any claim which the Cherokee Tribe, or any band thereof, arising under treaty stipulations, may have against the United States, upon which suit shall be instituted within two years after the approval of this Act; and also to examine, consider, and adjudicate any claim which the United States may have against said tribe, or any band thereof * * *.

This jurisdictional act was amended by the Act of March 3, 1903 (Chap. 994, 32 Stat. 982, 996) so as to permit certain groups to be considered as "bands" of Cherokees, and thus bring suit to have their claims adjudicated.

Under these Acts the Cherokee Nation brought suit, claiming the whole amount with interest found due by the Slade and Bender account. Thereafter, the Eastern Cherokees and also the Eastern and Emigrant Cherokees each brought suit (R. 18), and the three suits were consolidated and decided by the Court of Claims (40 C. Cls. 252), and judgment was rendered by the Court of Claims on May 18, 1905, as follows (R. 19):

It is, this 18th day of May, A. D. 1905, adjudged, ordered, and decreed that the plaintiff, the Cherokee Nation, do have and recover of and from the United States as follows:

Item 1: The sum of	$2,125.00
With interest thereon at the rate of 5 per cent from Feb. 27, 1819, to date of payment.	
Item 2: The sum of	1,111,284.70
With interest thereon at the rate of 5 per cent from June 12, 1838, to date of payment.	
Item 3: The sum of	432.28
With interest thereon at the rate of 5 per cent from Jan. 1, 1874, to date of payment.	
Item 4: The sum of	20,406.25
With interest thereon from July 1, 1903, to date of payment.	

It is important to note that this judgment was not for a lump sum, but directed payment of the principal items of the Slade and Bender audit, with interest thereon "to date of payment," thus providing that these items should continue to bear interest after the date of the judgment.

This decision was affirmed by this Court with a very slight modification as to the designation of those to whom part of such money should be paid, but with no change in other respects (202 U. S. 101), and on May 28, 1906, the Court of Claims entered a decree modifying its former decree, in accordance with the mandate of this Court, and fixed the compensation of the attorneys representing the Cherokees. (R. 19.) In

the Act of June 30, 1906 (Chap. 3912, 34 Stat. 634, 664), appropriation was made for the payment of the judgment of the Court of Claims as follows (R. 19, 20):

> To pay the judgment rendered by the Court of Claims on May eighteenth, nineteen hundred and five, * * * aggregating a principal sum of one million one hundred and thirty-four thousand two hundred and forty-eight dollars and twenty-three cents, as therein set forth, with interest upon the several items of judgment at five per centum, one million one hundred and thirty-four thousand two hundred and forty-eight dollars and twenty-three cents, together with such additional sum as may be necessary to pay interest, as authorized by law.

The Act of June 30, 1906, was amended by the Act of March 4, 1909 (Chap. 298, 35 Stat. 907, 938, 939), which provided (R. 20):

> That the general deficiency appropriation Act of June thirtieth, nineteen hundred and six, so far as the same provides for the payment of item 2 of the judgment of the Court of Claims of May eighteenth, nineteen hundred and five, in favor of the Eastern Cherokees, shall be so construed as to carry interest on said item 2 up to such time as the roll of the individual beneficiaries entitled to share in said judgment shall be finally approved by the Court of Claims, and for the payment of said interest a sufficient sum is hereby appropriated.

On March 15, 1910, the Court of Claims entered an order approving the roll of individuals entitled to share in the distribution of item 2 of the judgment. (R. 20.)

By Section 18 of the Act of June 30, 1919 (Chap. 4, 41 Stat. 3, 21), it was provided that (R. 20):

> For payment of interest upon certain interest-bearing trust funds belonging to the Cherokee Nation, which funds arose from the judgment of the Court of Claims of May 18, 1905, in favor of said Nation, and were paid into and retained in the Treasury of the United States, as follows, to wit:
>
> On the amount of the fund which arose from item 1 of said judgment as such amount was determined and paid to the Secretary of the Interior on July 2, 1906, to be by him credited to the principal of the Cherokee school fund, interest at 5 per centum per annum from July 2, 1906, to and including May 26, 1910; on the amount of the fund which arose from item 4 of said judgment, as such amount was determined and paid to the Secretary of the Interior on July 2, 1906, to be by him credited to the principal of the Cherokee national fund, interest at 5 per centum per annum from July 2, 1906, to and including May 26, 1910; on the original principal sum of item 4 of said judgment, interest at 5 per centum per annum from July 1, 1893, to July 1, 1903, and on the amount of the interest thus accruing interest at 4 per centum per annum from December 29, 1905, to May 14, 1906;

> and on the aggregate of the sums of the interest for the last two periods hereinabove mentioned, interest at 5 per centum per annum from July 2, 1906, to the date of the passage of this Act; and the sum of $27,500, or so much thereof as may be necessary, to pay the interest above allowed, is hereby appropriated and authorized to be paid to the Cherokee Nation: *Provided,* That the Secretary of the Treasury is hereby authorized and directed to pay the amount arising from item 4 of said judgment, with interest thereon as hereinabove provided for, to the agent appointed by the Cherokee Nation acting through its principal chief to receive the same, said payment to be made immediately upon the approval of this Act.

In payment of item 1 of said judgment, the principal of which item amounted to $2,125.00, the Government paid the sum of $13,706.18, which included interest. (R. 21.) Under item 2, the amount of the principal is $1,111,284.70, and the total paid, including interest, was $5,098,361.08. Under item 3 the principal was $432.28, and the total paid, including interest, was $1,140.49. Under item 4 the principal was $20,406.25, and the total paid, including interest, was $44,797.79. The Government paid upon said judgment for principal and interest the sum of $5,158,005.54. (R. 21, 22, 23.) The dates of such payments by the Government, and to whom they were made, is shown in Finding IX of the court below. (R. 23.)

By the Act of March 3, 1919 (Chap. 103, 40 Stat. 1316) it was provided (R. 11, 12):

> That jurisdiction is hereby conferred upon the Court of Claims to hear, consider, and determine the claim of the Cherokee Nation against the United States for interest, in addition to all other interest heretofore allowed and paid, alleged to be owing from the United States to the Cherokee Nation on the funds arising from the judgment of the Court of Claims of May eighteenth, nineteen hundred and five (Fortieth Court of Claims Report, page two hundred and fifty-two) in favor of the Cherokee Nation. The said court is authorized, empowered, and directed to carefully examine all laws, treaties, or agreements, and especially the agreement between the United States and the Cherokee Nation of December nineteenth, eighteen hundred and ninety-one, ratified by the United States March third, eighteen hundred and ninety-three (Twenty-seventh Statutes at Large, page six hundred and forty, section ten), in any manner affecting or relating to the question of interest on said funds, as the same shall be brought to the attention of the court by the Cherokee Nation under this Act. And if it shall be found that under any of the said treaties, laws, or agreements interest on one or more of the said funds, either in whole or in part, has not been paid and is rightfully owing from the United States to the Cherokee Nation, the court shall render final judgment

> therefor against the United States and in favor of the Cherokee Nation, either party to have the right to appeal to the Supreme Court of the United States as in other cases. The said claim shall be presented within one year after the passage of this Act by petition in the Court of Claims by the Cherokee Nation as plaintiff against the United States as defendant, * * *.

Appellant filed suit on February 5, 1920, and its amended petition was filed March 12, 1923. (R. 11.) The suit was based on the theory that the principal items found owing to the Indians in the Slade and Bender statement should have carried interest at the rate of 5 per cent. per annum from the respective dates specified in the Slade and Bender statement to March 4, 1895, the date on which Congress should have appropriated the money for payment of the items included in the Slade and Bender statement, and that, on account of the default in this payment on March 4, 1895, the Cherokee Nation was entitled to have the principal items and the accrued interest to March 4, 1895, added together to form a new principal sum on which interest should thereafter have been computed. In its brief in this Court, the appellant contends, as an alternative to the above claim, that if interest is not to be compounded as of March 4, 1895, or a new principal calculated as above stated, nevertheless a like calculation should have been made as of May 18, 1905, the date of the judgment

in the Court of Claims, and the principal items covered by the Slade and Bender statement, with accrued interest to May 18, 1905, the date of that judgment, should have been treated as a new principal, bearing interest thereafter at the rate of 5 per cent. per annum.

ARGUMENT

SUMMARY

I. The Act of March 3, 1919, under which this suit is brought, should be construed as conferring jurisdiction on the Court of Claims to reexamine the matter of the liability of the United States for interest, without regard to the former adjudication of that question by the Court of Claims.

II. The obligation of the United States under the agreement of 1891 and the acceptance of the Slade and Bender audit was to pay on or before March 4, 1895, the principal items in the Slade and Bender audit, with simple interest thereon from the dates the liabilities arose until the payment of the principal items. The failure to pay at the time specified left the United States under a continuing obligation to pay the principal items and simple interest thereon until such principal items were paid. No general principle of law exists which in such a case requires compounding the interest by treating the principal and accrued interest to the date of the breach as a new principal. There is much in the treaties and agreements between the

Cherokee Nation and the United States which contemplated the payment of simple interest on certain amounts owing by the Government, but nothing to sustain a claim for compound interest.

The Slade and Bender account, accepted by the Cherokee Nation, itself expressly provided for simple interest on the principal items from the date they arose until such time as the principal items should be paid.

III. The judgment of May 18, 1905, rendered by the Court of Claims was not for a lump sum representing the principal and accrued interest to the date of judgment. Such a judgment under applicable statutes would not have borne interest except pending an unsuccessful appeal by the United States.

Under the Slade and Bender audit, the Cherokee Nation was entitled to simple interest on the principal items as of the dates they arose, until such principal items were paid. Recognizing this, the judgment of the Court of Claims was that the Indians be paid the principal items with interest thereon *to date of payment* at the rate of 5 per cent per annum, thus providing for simple interest on the original principal subsequent to the date of the judgment. The rate used by the court was that approved by the Senate in 1850, and used in all contracts with the Cherokee Nation.

The suggestion that principal and accrued interest to date of the judgment be treated as the amount of the judgment and as a new principal on

which interest thereafter should have been calculated is contrary to the terms of the judgment, and is more than the Slade and Bender statement called for.

The Indians received all they were entitled to on the construction of the judgment advanced by the United States.

I

THE ACT OF MARCH 3, 1919, AUTHORIZED THE COURT OF CLAIMS TO REEXAMINE THE INTEREST CLAIM WITHOUT REGARD TO THE FORMER ADJUDICATION

Much of appellant's brief is devoted to a discussion of whether the matter here in controversy has been heretofore adjudicated, and whether Congress has power to waive a former adjudication in favor of the United States, and whether the Act of March 3, 1919, was intended to authorize the Court of Claims to reopen the question as to the method of computation and amount of interest for the period prior to the former judgment rendered by that court May 18, 1905.

The position taken by the United States in the court below may have justified the attention here given these points by the appellant.

We may dispose of all these points by stating that the United States takes the view that the judgment of 1905, determining, as it did, that the principal items in the Slade and Bender account should bear simple interest from the date the original liabilities arose until the principal items were paid, did

adjudicate the method of computation of interest for the period before the date of the judgment and also adjudged that subsequent to the date of the judgment the principal items in the Slade and Bender account should continue to bear simple interest at the rate of 5 per cent per annum " to date of payment," thus negativing the idea that the principal and accrued interest to the date of the judgment should be treated as a new principal.

In this connection, it should be noted that the judgment of the Court of Claims in 1905 was not for a stated sum, calculated to the date of the judgment, but was, by its terms, an adjudication that certain principal items be paid with interest thereon at the rate of 5 per cent per annum until paid.

We take the view, however, that the terms of the Act of March 3, 1919, Chap. 103, 40 Stat. 1316, under which the Court of Claims exercised jurisdiction in this case, considered in the light of the controversy then existing between the United States and the Cherokee Nation, should be construed as a waiver of the defense of *res adjudicāta,* in the interest of complete fairness to the Indians, and as authorizing the Court of Claims to reexamine the matter of interest on the principal items in the Slade and Bender account; that no constitutional limitation stands in the way of such a waiver, and that such a waiver does not deprive this proceeding of the essential characteristics of a judi-

cial proceeding, over which this Court may, within the Constitution, exercise appellate jurisdiction.

We understand the Court of Claims took the same view, and intended to and did reexamine the question of interest, and reiterated its former decision, not because it felt bound by it, but because it believed it to be right.

These concessions leave for consideration only the merits, and the two contentions of the appellant that the principal and accrued interest to March 4, 1895, should have been treated as a new principal sum or, in the alternative, if only simple interest were allowable to the date of the judgment of 1905, a new principal should have been established as of the date of that judgment, made up of the original principal and accrued interest to that date, and which thereafter bore interest at five per centum.

II

THE CONTENTION THAT THE DEFAULT IN PAYING PRINCIPAL AND ACCRUED INTEREST ON MARCH 4, 1895, REQUIRES COMPOUNDING THE INTEREST AS OF THAT DATE IS NOT SUPPORTED BY LEGAL PRINCIPLES OR THE PROVISIONS OF ANY TREATY OR AGREEMENT

The contention of the appellant seems to be that on failure of Congress to appropriate by March 4, 1895, the amount necessary to pay the Slade and Bender account, the principal items thereof, plus the accrued simple interest thereon, became constructively a trust fund in the Treasury of the United States and constituted a new principal, on

which thereafter the Indians were entitled to interest at the rate of 5 per cent per annum.

The agreement of 1891 provided that the United States should render to the Cherokee Nation a complete account of moneys admitted by the United States to be owing to the Cherokee Nation under any prior treaties or Acts of Congress. The Cherokee Nation was given the right within twelve months to enter suit against the United States if it believed the statement to be unjust or incorrect. (R. 3.)

The Slade and Bender statement prepared in accordance with this agreement showed certain principal items due the Cherokee Nation, together with interest thereon from the dates the liabilities arose "to date of payment." This statement was accepted and agreed to by the Cherokee Nation and thus defined the obligation of the United States.

The agreement of 1891 had provided that moneys to discharge these obligations should be appropriated at the session immediately following the accounting. This session ended March 4, 1895, without an appropriation.

As between private individuals, a default by one in a promise to pay to the other a principal sum, with interest thereon until the principal sum is paid, does not result in compounding interest or in creating a new principal as of the date of default, on which interest is to be computed. Compounding interest is generally forbidden, and the only

common exception is in the case of interest coupons. No principle or rule of law has been pointed out by the appellants which justifies the compounding of interest as a result of and on the date of default.

The agreement of 1891, relied on by the appellant to support its claim for compounding interest as of March 4, 1895, contains no provision having that effect. The sixth paragraph (R. 3) fixed the cash consideration intended to be paid for the lands ceded. In that paragraph it was provided:

> So long as the money or any part of it shall remain in the Treasury of the United States after this agreement shall have become effective, such sum so left in the Treasury of the United States shall bear interest at the rate of five per centum per annum, payable semiannually * * *.

This provision had reference to the sum of money specified in the sixth paragraph to be paid as additional consideration for the lands ceded; but if it be given any application to the moneys which might be found owing as provided in the fourth paragraph, it provides only for simple interest and not for compound interest, and should not be construed to go so far as to contemplate that the principal and accrued interest disclosed to be owing to the Indians under the accounting provided for in the fourth paragraph should be treated as a new principal in the Treasury of the United States on which interest should thereafter be calculated. Such an

interpretation is squarely contradicted by the practical interpretation given to the agreement by the United States and the Cherokee Nation through the acceptance of the Slade and Bender statement rendered under the fourth paragraph of the agreement of 1891, and which expressly provided that the principal items therein shown should bear simple interest until paid, an arrangement wholly inconsistent with the contention that such principal items and accrued interest should be treated as a new principal on which interest should be calculated.

The appellant advances, as additional reasons in support of its claim for compound interest, various treaties and statutes. Its principal reliance is the Act of September 11, 1841, Chap. 25, 5 Stat. 465. That Act has no special reference to Indians. It provided, in Section 2:

> That all other funds held in trust by the United States, and the annual interest accruing thereon, when not otherwise required by treaty, shall in like manner be invested in stocks of the United States, bearing a like rate of interest.

The contention of the appellant is, as we understand it, that this obligation of the United States to the Cherokee Nation should, from and on the date on which the United States promised to pay it, be treated as a trust fund in the Treasury under the terms of the Act of 1841 and should have been invested in stocks of the United States at a rate

of interest not less than 5 per cent per annum. The mere statement of this proposition carries its own answer. The contention that any unsatisfied obligation of the United States, with accrued interest thereon, should be treated as a trust fund in its Treasury on the date the obligation became due should be rejected without further discussion.

The Treaty of 1819 between the United States and the Cherokee Nation, 7 Stat. 195, in Article 4, provided that proceeds of certain lands belonging to the Indians and sold by the United States should be invested in stock of the United States and the interest or dividends on the stock should be applied to educate the Cherokee Indians. There is nothing about this treaty which justifies the contention that, in any event, more than simple interest should be paid.

The Treaty of 1835, 7 Stat. 478, in Article 10, provided that the funds of the Indians held in trust by the United States should be invested and the income applied to the use of the Indians. There is nothing here that has any bearing on the present case.

The Treaty of August 6, 1846, 9 Stat. 871, in Article XI, provided that there should be—

> submitted to the Senate of the United States for its decision * * * the question, whether the Cherokee nation shall be allowed interest on whatever sum may be found to be due the nation, and from what date and at what rate per annum.

And in pursuance of that treaty the Senate of the United States, by Resolution adopted in 1850, provided:

> That it is the sense of the Senate that interest at the rate of 5 per cent per annum should be allowed upon the sums found due to the Eastern and Western Cherokees, respectively,, from the twelfth day of June, eighteen hundred and thirty-eight, until paid.

Here again we find a provision for simple interest on the principal items until the principal items are paid.

The Treaty of 1866, 14 Stat. 799, in Article XXIII, provided:

> All funds now due the nation, or that may hereafter accrue from the sale of their lands by the United States as hereinbefore provided for, shall be invested in United States registered stocks at their current value, and the interest on all said funds shall be paid semi-annually on the order of the Cherokee nation, and shall be applied to the following purposes * * *.

This treaty merely provided for simple interest to be paid semi-annually to the Cherokee Nation.

It was by virtue of the Treaty of 1846 and the Senate Resolution following it that the Court of Claims and this Court, in previous litigation on this subject, determined that the Cherokee Nation was entitled to simple interest at the rate of 5 per cent per annum on the principal items in the Slade and

Bender statement from the dates the liability for those items arose until such date as the principal items should be paid.

Were it not for such provisions in the treaties with the Indians and in the action of the Senate thereon, the Indians would not have been entitled to any interest, as, in the absence of a stipulation to pay interest or a statute allowing it, none can be recovered against the United States.

The contention of the appellant that the funds owing from the United States to the Cherokee Nation should be treated as trust funds in its Treasury, invested in interest-bearing obligations of the United States, demands too little as well as too much. Applied logically, the result would be that the principal items stated in the Slade and Bender account to have been owing from the United States from 1819, and from 1838, and from 1874, and from 1893, should be treated from those dates as trust funds invested for the benefit of the Indians in interest-bearing securities of the United States, and the income thereon reinvested as it accrued, with the result that interest on these various items from the date the original obligations arose should be compounded annually or semiannually for a hundred years or less, thus producing an obligation to the Indians comparable in size to the national debt. Why the failure to pay on March 4, 1895, should be taken as the date for this process is not apparent. These amounts have been continuously

owing, and the United States has been continuously in default thereon from the dates specified in the Slade and Bender statement, and if default in payment is the criterion, that occurred long before 1895.

III

THE CHEROKEE NATION HAS BEEN PAID ALL THE INTEREST TO WHICH IT WAS ENTITLED UNDER THE TERMS OF THE JUDGMENT OF MAY 18, 1905

In the event that its claim to the establishment of the new principal sum as of March 4, 1895, is rejected, appellant presents an alternative claim, based on the judgment of May 18, 1905. This contention is that the principal items in the Slade and Bender statement, plus accrued simple interest thereon at the rate of 5 per centum per annum to the date of that judgment, should be added together to form a new principal sum bearing interest subsequent to the date of the judgment at the rate of 5 per cent per annum, and it contends that the amount of the judgment calculated in this way has not been paid.

Such a contention is opposed to the terms of the judgment itself. Appellant entirely overlooks the fact that the judgment of May 18, 1905, was not a judgment for a stated sum of money calculated by the court.

If on May 18, 1905, a judgment had been entered for a stated sum in favor of the Cherokee Nation, under applicable statutes, that judgment would not

have borne interest, except pending an unsuccessful appeal by the United States, and then at only 4 per centum per annum. To have entered such a judgment would have been to disregard the agreement contained in the acceptance of the Slade and Bender audit. That statement expressly provided that the principal items therein named should bear interest from the dates the liability for the items arose until such date as the principal items should be paid. To carry out this arrangement it was necessary that the judgment of the Court of Claims should conform to it, and so that judgment provided and decreed that the United States should pay to the Cherokee Nation the principal items specified in the Slade and Bender statement, with interest thereon at the rate of 5 per centum per annum "*to date of payment.*" This judgment, therefore, specified the rate, the method of computation of interest, and the principal amounts on which interest should be computed, for such period subsequent to the date of the judgment as might elapse before payment was made. To alter this arrangement by treating the principal items in the Slade and Bender statement and the accrued interest to the date of the judgment as a new principal sum, on the theory that judgment was entered for such an amount, would be to disregard the express provisions of that judgment. It is obvious, therefore, that the appellant may not successfully contend that payment has not been made in accordance

with the provisions of that judgment, unless it be shown that the amounts paid by the United States in satisfaction of the judgment are less than the principal items of the Slade and Bender statement, with simple interest thereon at the rate of 5 per centum per annum from the dates specified in the judgment to the date of ultimate payment.

Appellant has not contended that payments made by the United States are not sufficient to discharge the judgment so construed. As a matter of fact, the method of computation adopted by the Treasury Department in the satisfaction of this judgment resulted in the payment to the Indians of more than the strict terms of the judgment called for, and the method adopted by the Treasury Department was afterwards ratified and approved by Congress. The method adopted by the Treasury Department may be illustrated by considering what was done with respect to Item 1 in the Slade and Bender statement. That item was for the principal sum, $2,125.00, and, under the Slade and Bender statement and the judgment of 1905, the Cherokee Nation was entitled to the payment of $2,125 with simple interest thereon at the rate of 5 per cent per annum from February 27, 1819, until the date the principal item was paid.

The Treasury Department did not follow the interpretation of the judgment which the Government now stands on, nor did it adopt the view of the appellant that the judgment should be considered as establishing a new principal as of May 18,

1895. The Treasury Department calculated simple interest on this principal item at the rate of 5 per cent per annum from February 27, 1819, to December 29, 1905, which was the date the transcript of the judgment was filed in the Treasury Department. To this extent it recognized that the judgment was not for a stated sum, and it gave effect to the terms of the judgment that the principal items should bear simple interest at the rate of 5 per cent per annum subsequent to the date of the judgment. The total of the principal and interest so computed was then treated as a new principal as of December 29, 1905, the date of the filing of the transcript in the Treasury, and interest was allowed on such new principal at 4 per cent per annum from December 30, 1905, to May 14, 1906, the date of the issuance of the mandate of this Court. (R. 21.) This new total of $11,520.46 was paid to the Secretary of the Interior for the account of the Cherokee Nation on July 2, 1906. (R. 23.) This allowance and computation of interest was made on the supposed authority of the Act of September 30, 1890, Chap. 1126, 26 Stat. 504, 537, which provides:

> That hereafter it shall be the duty of the Secretary of the Treasury to certify to Congress for appropriation only such judgments of the Court of Claims as are not to be appealed, or such appealed cases as shall have been decided by the Supreme Court to be due and payable. And on judgments in

> favor of claimants which have been appealed by the United States and affirmed by the Supreme Court, interest, at the rate of four per centum per annum, shall be allowed and paid from the date of filing the transcript of judgment in the Treasury Department up to and including the date of the mandate of affirmance by the Supreme Court: *Provided,* That in no case shall interest be allowed after the term of the Supreme Court at which said judgment was affirmed.

This statute was manifestly intended to apply to the usual cases where judgments against the United States bore no interest and not to a special case where a judgment against the United States in the Court of Claims provided for interest after its entry. The statute was intended to penalize the United States for delay in payment pending an unsuccessful appeal by it to the Supreme Court. It is obvious that where the judgment in the Court of Claims is not for a stated sum, but itself contemplates and provides for a computation and allowance of interest on items included in the judgment for a period subsequent to the date of the judgment, the statute referred to has no application. Furthermore, the statute only allows interest pending appeal upon the amount of the judgment for the period from the date of the filing of the transcript with the Treasury to date of affirmance. In the present case, the Treasury Department had obvious difficulty in applying the statute, because the

judgment was not for any definite amount, and the Treasury Department surmounted this difficulty by calculating interest at the rate of 5 per cent per annum on the principal items covered by the judgment up to the date of the filing of the transcript, and treated this as the amount of the judgment on which it allowed 4 per cent pending appeal. By using this method of calculation the Treasury disregarded the provision of the judgment that the principal items covered by it should bear interest at the rate of 5 per cent per annum until paid. However, the method used by the Treasury resulted in the payment of more money to the Cherokee Nation than a correct interpretation of the judgment required, because the 4 per cent per annum calculated on the original principal and interest accrued to December 29, 1905, resulted in the payment of a larger sum than would the calculation of 5 per cent per annum simple interest on the original principal item from 1819 to the date of payment in 1906. Some Appropriation Acts passed by Congress subsequent to the date of the judgment of 1905 show that Congress accepted the method of calculation adopted by the Treasury Department. This prevents the United States from asserting a counterclaim for overpayment, but it does not entitle the Cherokee Nation to more money than it has received.

An analysis of the method used by the Treasury Department in satisfying the various other items covered by the judgment of 1905 will be found in

the appendix. It is sufficient to say that the amounts actually paid in all cases equalled or exceeded the amount owing on the view that the judgment by its terms contemplated simple interest on the original principal to the ultimate date of the payment.

CONCLUSION

Reexamining the questions involved, in disregard of the former adjudication, it is clear that the Court of Claims and this Court reached a correct conclusion in the former litigation in allowing only simple interest on the principal items covered by the Slade and Bender account from the dates the liability for those items arose to the date of ultimate payment of the principal items. It is also apparent that, treating the judgment of 1905 as correct and giving it a proper interpretation, the Cherokee Nation has been paid all that the judgment required.

Respectfully submitted.

WILLIAM D. MITCHELL,
Solicitor General.

HERMAN J. GALLOWAY,
Assistant Attorney General.

FEBRUARY, 1926.

APPENDIX

DISCUSSION OF ITEM 2

The principal of Item 2 amounts to $1,111,284.70. The Treaty of 1835 provided for the cession of certain lands by the Cherokee Indians to the United States and the payment of the sum of $5,000,000 to the Indians by the United States for such land. Certain deductions were to be made from said treaty fund of $5,000,000 on account of the claims and expenditures for which the Indians should pay the United States. Certain investments, which were proportionately small in amount were to be made by the United States in trust funds out of this treaty fund for the benefit of the Indians and the balance of such treaty fund was to be distributed per capita among the Indians. This Treaty of 1835, together with its amendments in 1836, were disputed by certain of the Cherokees, and finally the Indians removed from the eastern lands in 1838. All of the Cherokees were brought in under the provisions of the Treaty of 1835 by the Treaty of 1846, which last named treaty, among other things, provided for a reference to the Senate of the United States for a determination of the question whether any interest should be paid to the Cherokees upon any amounts that might be due to them. The Senate, by resolution, in 1850, provided that interest should be paid upon such sums at the rate of 5% per annum from June 12, 1838 "*until paid.*" On June 12, 1838 (5 Stat. 242)

Congress appropriated an amount of money to pay for the removal of the Cherokees from the east to the west and provided that no part thereof should be deducted from the $5,000,000 fund. (40 C. Cls. 270.)

Only about $49,000 of this sum was used to pay such removal expense, and the sum of $1,111,284.70 was paid from the $5,000,000 fund to meet the expenses of such removal. (40 C. Cls. 271.) The Record does not show by any affirmative statement that the small trust funds provided for in the Treaty of 1835 were actually paid. However, such sums were proportionately very small, and it must be assumed that they were paid as provided, as this claim for approximately $1,000,000 is for a balance, and as the Court of Claims in its decision in 40 C. Cls. 252, and this Court in its decision in 202 U. S. 101, provided that the payment of this balance should be made not to a trust fund but for per capita distribution. Further than this, the appellant has not shown that any of such trust items were not actually paid as provided for in said Treaty of 1835, and we may therefore safely say and assume that these items were actually paid, and that in accordance with the decisions of this Court and the Court of Claims the principal sum of Item 2 was not a trust fund but one for per capita distribution.

We have heretofore shown that the Treaty of 1846, and the Senate Resolution of 1850, did not provide for compound interest and that the agreement of 1891 contained no provisions which would require or justify the payment of compound interest. Neither this treaty, the resolution, nor the agreement made the principal of Item 2 a trust

fund. The Slade and Bender account provided for interest upon this item " from June 12, 1838, to date of payment." (R. 17.) The judgment of the Court of Claims rendered May 18, 1905, provided for interest upon Item 2 as follows (R. 19):

> With interest thereon at the rate of 5 per cent from June 12, 1838, to date of payment.

The transcript of this judgment was filed in the Treasury on December 29, 1905. (R. 21.) The mandate of this Court, affirming such judgment, was issued on May 14, 1906. (R. 21.) The Appropriation Act of June 30, 1906 (34 Stat. 634, 664), provided—

> To pay the judgment rendered by the Court of Claims on May eighteenth, nineteen hundred and five * * * aggregating a principal sum one million one hundred and thirty-four thousand two hundred and forty-eight dollars and twenty-three cents, as therein set forth, with interest upon the several items of judgment at five per centum, one million one hundred and thirty-four thousand two hundred and forty-eight dollars and twenty-three cents, together with such additional sum as may be necessary to pay interest, as authorized by law.

The roll of the individual Cherokees entitled to the per capita distribution of Item 2 was not approved by the Court of Claims until March 15, 1910. (R. 20.) Over $250,000 was paid to the representatives of the Cherokees for attorneys' fees and expenses at various times between July 2, 1906, and March 15, 1910. (R. 23.) The exact dates of such

payments are not shown in the record. The Act of March 4, 1909 (35 Stat. 907, 938, 939), provided that, as to Item 2 of this judgment, the Appropriation Act of June 30, 1906, which appropriated for the payment thereof—

> shall be so construed as to carry interest on said item 2 up to such time as the roll of the individual beneficiaries entitled to share in said judgment shall be finally approved by the Court of Claims, and for the payment of said interest a sufficient sum is hereby appropriated.

In all the above there is nothing which provides for the compounding of interest upon Item 2, nor is there anything that makes Item 2 a trust fund.

In the payment of this judgment the United States computed interest upon the original principal sum of $1,111,284.70 at 5% per annum from June 12, 1838 (the date the principal sum was withdrawn from the $5,000,000 treaty fund), to December 29, 1905 (the date of filing the transcript in the Treasury), and then upon the new principal consisting of the total of the old principal and the interest as above set out the United States computed interest at the rate of 4% per annum from December 30, 1905 (the date of filing the transcript in the Treasury), to May 14, 1906 (the date of the issue of the mandate by this Court). This allowance of interest at the rate of 4% apparently was made in accordance with the supposed authority of the Act of September 30, 1890 (26 Stat. 504, 537), which has been set out in the discussion under Item 1, and which we feel was inapplicable, but certainly resulted in an overpayment instead of an underpayment in this case.

The Record shows that the United States then paid as additional interest under the Act of March 4, 1909, which amended the Appropriation Act of June 30, 1906, the sum of $161,324.92. (R. 21.) The Record does not show just how this additional interest was computed, but it could not have been interest upon a new principal consisting of the old principal together with the interest accrued to the date of the filing of the transcript, as such sums totaled approximately $5,000,000, and interest for one year at 5% upon that sum would be approximately $250,000. We therefore must assume from the Record that the additional interest was computed upon the original principal of $1,111,284.70, from which deductions had been made at proper times for the attorneys' fees and expenses which had been paid out of the same.

The original Appropriation Act of June 30, 1906 (34 Stat. 634, 664), provided for the payment of the judgment—

> aggregating a principal sum of one million one hundred and thirty-four thousand two hundred and forty-eight dollars and twenty-three cents, as therein set forth, with interest upon the several items of judgment at five per centum, one million one hundred and thirty-four thousand two hundred and forty-eight dollars and twenty-three cents, together with such additional sum as may be necessary to pay interest, as authorized by law.

The total of the principal items amounted to the sum of $1,134,248.23 (R. 19), without the addition

of any interest. This is the same sum as is twice specified in the Appropriation Act of 1906. The statute also provided for the payment of interest "as authorized by law." This does not change the existing statutes in any way, and we have heretofore seen that up to that time there were no statutes or treaties requiring the compounding of interest. This Appropriation Act does not require the compounding of interest. The Act of March 4, 1909 (35 Stat. 907, 938, 939), was an amendment of the Appropriation Act of June 30, 1906, and provided as follows:

> That the general deficiency appropriation Act of June thirtieth, nineteen hundred and six, so far as the same provides for the payment of item 2 of the judgment of the Court of Claims of May eighteenth, nineteen hundred and five, in favor of the Eastern Cherokees, shall be so construed as to carry interest on said item 2 up to such time as the roll of the individual beneficiaries entitled to share in said judgment shall be finally approved by the Court of Claims, and for the payment of said interest a sufficient sum is hereby appropriated.

This section merely amends the old Appropriation Act and identifies the judgment as provided for in such Act of June 30, 1906, and it will be recalled that the Act of June 30, 1906, provides for the payment of the principal sum with interest and creates no obligation to compound such interest. The new act providing for the payment of interest between the dates specified in such Act creates no obligation, right or duty to compound such interest.

The use of the word " judgment " in the new Act is the same as in the Act of June 30, 1906, which it amends, and the Act of June 30, 1906, has been shown to mean by the word " judgment " the total principal sums of the four items comprising such judgment.

We submit, therefore, that the United States has paid to the appellant more than is due to it, both principal and interest, in accordance with the applicable treaties, laws, and agreements.

DISCUSSION OF ITEM 4.

The principal, $20,406.25, of Item No. 4 arises under the Act of March 3, 1893 (Chap. 209, 27 Stat. 612, 638). The origin of this item is as follows (House Executive Document 182, Third session, 53d Congress, 1894–1895, Vol. 32, p. 29):

On June 4, 1863, $15,000 belonging to the Choctaw Orphan Reservation Fund was expended for the relief of persons belonging to the Cherokee Nation. The transaction disappeared from sight and was brought to light in 1890, and the $15,000 principal was restored to the Choctaw fund by the Act of August 19, 1890 (Chap. 807, 26 Stat. 336, 340). By the Act of March 3, 1893 (27 Stat. 612, 638), interest on this $15,000 from June 4, 1863, to August 18, 1890, and amounting to $20,406.25 was paid to the Choctaw fund and charged to the Cherokee invested fund. The Slade and Bender account determined that as the Cherokees in 1863 had sufficient money to have supplied this $15,000 which was erroneously taken from the Choctaw fund, it would be improper and unfair to compel the Cherokees to lose the interest thereon; and therefore determined that the Cherokees should be

paid by the United States this sum of $20,406.25 which had been charged to their invested funds by the Act of 1893. The Act of March 3, 1893, provided (27 Stat. 639)—

> that any amount that may be found due by the Secretary shall be credited to the Choctaw fund charged to the Cherokee fund.

There is nothing in this Act that requires the payment of compound interest.

It seems to have been considered by the parties to this transaction that Item 4 was a trust fund. Assuming that such item was a trust fund, the specific provisions of Article 23 of the Treaty of 1866 (14 Stat. 799, 805) would be applicable, and that Article is as follows:

> All funds now due the nation, or that may hereafter accrue from the sale of their lands by the United States as hereinbefore provided for, shall be invested in United States registered stocks at their current value, and the interest on all said funds shall be paid semi-annually on the order of the Cherokee Nation, * * *.

It was then provided that a certain portion of such interest should be applied for educational purposes, another portion to the Orphan Fund, and 50% for general purposes. Strictly speaking, Item 4 is therefore not a trust fund, but is an invested fund with provisions that the interest when earned shall be immediately distributed. If it was not so distributed, as against the United States, such breach would not create a right for the compounding of the interest. It is desired also to further point out that Article 23 of the Treaty of 1866 removes any application of the Act of September 11, 1841

(5 Stat. 465), upon which appellant relies, if such statute ever had any application. The statute of 1841 by its very terms has no application if the interest is otherwise provided for by treaty; and certainly the Treaty of 1866, as above shown, does otherwise provide.

We thus see that the source of this item creates no obligation or right for the compounding of interest. We have heretofore shown in the discussion of the other items that the agreement of 1891 did not justify the compounding of interest. The judgment of the Court of Claims on May 18, 1905, provided for the principal sum "with interest thereon from July 1, 1903, to date of payment." (R. 19.) The transcript was filed in the Treasury Department on December 29, 1905. (R. 21.) The mandate of this Court affirming the judgment of the Court of Claims was issued on May 14, 1906. (R. 21.) On June 30, 1906, the Act appropriating for the payment of this judgment (34 Stat. 634, 664) was approved, which appropriated for the total of the items of the principal of said judgment "together with such additional sum as may be necessary to pay interest, as authorized by law." This created no right to compounded interest. On July 2, 1906, there was paid to the Secretary of the Interior on account of Item 4 the sum of $23,294.93. (R. 23.) The Act of June 30, 1919 (41 Stat. 3, 22), provided for the payment of additional interest upon Item 4 as follows:

> on the amount of the fund which arose from item 4 of said judgment, as such amount was determined and paid to the Secretary of the Interior on July 2, 1906, to be by him cred-

ited to the principal of the Cherokee national fund, interest at 5 per centum per annum from July 2, 1906, to and including May 26, 1910; on the original principal sum of item 4 of said judgment, interest at 5 per centum per annum from July 1, 1893, to July 1, 1903, and on the amount of the interest thus accruing interest at 4 per centum per annum from December 29, 1905, to May 14, 1906; and on the aggregate of the sums of the interest for the last two periods hereinabove mentioned, interest at 5 per centum per annum from July 2, 1906, to the date of the passage of this Act; and the sum of $27,500, or so much thereof as may be necessary, to pay the interest above allowed, is hereby appropriated and authorized to be paid to the Cherokee Nation: *Provided,* That the Secretary of the Treasury is hereby authorized and directed to pay the amount arising from item 4 of said judgment, with interest thereon as hereinabove provided for, to the agent appointed by the Cherokee Nation acting through its principal chief to receive the same, said payment to be made immediately upon the approval of this Act.

It will be hereafter shown that the exact provisions of this statute were followed.

Now let us see how the United States actually computed the amounts which it paid upon this judgment. (R. 22.) The principal was $20,406.25; interest was computed from July 1, 1903, at 5% per annum to December 29, 1905 (the date of filing the transcript in the Treasury). This omitted a

period of 10 years between July 1, 1893 (the date upon which the moneys were actually withdrawn from the Cherokee fund to reimburse the Choctaw fund) to July 1, 1903, but that period was covered by the Act of June 30, 1919, and the subsequent payments made thereunder. Upon the total of the principal and the interest from July 1, 1903, to December 29, 1905, interest was again computed from December 30, 1905 (the date of filing the transcript in the Treasury) to May 14, 1906 (the date of the issue of the mandate by this Court). (R. 22.)

The record does not state whether this was at 4% or 5%. However, mathematical calculation proves it to be at 4%, and therefore it was made under the provisions of the Act of September 30, 1890 (26 Stat. 504, 537), which has been heretofore discussed and shown to be inapplicable and to have resulted in an overpayment to appellant instead of an underpayment. The total of all of these items was then paid on July 2, 1906, to the Secretary of the Interior (R. 23), which was within two days after the Act of June 30, 1906, appropriating for the payment of the judgment. However, the Act of June 30, 1919, as above shown, provided that additional interest at 5% per annum from July 2, 1906, to May 26, 1910, should be paid, and that on the original principal of Item 4 interest at 5% per annum from July 1, 1893, to July 1, 1903, and on the amount of the interest thus accrued interest at 4% per annum from December 29, 1905, to May 14, 1906 (the interim between the filing of the transcript in the Treasury and the mandate of this Court), and upon the aggregate sum of interest for the last

two periods, interest at 5% per annum from July 2, 1906, to the date of the passage of this Act which was June 30, 1919.

Under such Act, the Government calculated interest at 5% from July 2, 1906, to November 3, 1906 (the date of the payment of attorneys' fees under said judgment) (R. 23), upon the total of the original principal, together with the interest as the Government had formerly computed the same. This was strictly in accordance with the Act of June 30, 1919. The Government then computed interest upon this same total, less attorneys' fees, from November 4, 1906 (the date of payment of attorneys' fees), to May 26, 1910 (the date fixed in the Act of June 30, 1919). This also was in accordance with the provisions of the Act of June 30, 1919.

The Government then computed interest at 5% upon the original principal of Item 4 from July 1, 1893, to July 1, 1903, which amounted to $10,203.12, and then computed interest upon this sum at 4% from December 30, 1905, to May 14, 1906 (the dates specified in the statute, also being the dates between the filing of the transcript and the issue of the mandate of this Court), and then computed interest at 5% upon the total of these last two sums of interest from July 2, 1906, to June 30, 1919 (the dates specified in the Act of June 30, 1919). All of this was strictly in accordance with the Act of June 30, 1919, and the totals of such sums were paid to the Secretary of the Interior on or about August 7, 1919. (R. 23.)

We submit to the Court that as to Item 4, there is nothing in any of such agreements that would jus-

tify, warrant or require the payment of compound interest, and that appellant has been paid more than it is entitled to receive.

DISCUSSION OF ITEM 3

The principal of this item is $432.28. It is so small that it seems hardly worthy of consideration. However, in order to make the discussion complete, we shall proceed to consider the same. This item arose as a balance due to the Cherokee Indians under the Treaty of 1866 (14 Stat. 799, 804, 805) wherein it was provided that the Government might sell certain lands of the Cherokees, the proceeds of such sale to go to the benefit of the Nation. Article 23 of that treaty (14 Stat. 805) provided that—

> All funds now due the nation, or that may hereafter accrue from the sale of their lands by the United States as hereinbefore provided for, shall be invested in United States registered stocks at their current value, and the interest on all said funds shall be paid semi-annually on the order of the Cherokee Nation, and shall be applied to the following purposes, * * *.

Then follows a provision that 35% of the accruing interest should be applied for educational purposes, 15% for the benefit of orphans, and 50% for general purposes. As hereinbefore discussed in connection with Item 4, this article of the treaty removed all application and effect of the Act of September 11, 1841 (5 Stat. 465)—if it ever had any application—and provided for the payment of the interest immediately after its accrual. If a

default was made in such payment, it did not justify the compounding of the interest as against the United States. Nothing else in the statute or treaty justified such compounding of interest.

We have also heretofore shown that the agreement of 1891 did not require the compounding of interest upon this item. The Slade and Bender account provided as to Item 3 that the principal should be paid " with interest from January 1, 1874 to date of payment." (R. 17.) The judgment of the Court of Claims entered on May 18, 1905, provided for the payment of the principal " with interest thereon at the rate of 5% from January 1, 1874, to date of payment." (R. 19.) Neither of these created any obligation for compound interest. The judgment of the Court of Claims was rendered on May 18, 1905. (R. 19.) The transcript was filed in the Treasury on December 29, 1905. (R. 21.) The mandate of this Court was issued on May 14, 1906. (R. 21.) The Act appropriating for the payment of this judgment was approved June 30, 1906 (34 Stat. 634, 664), and we have heretofore shown that this appropriation appropriated for the payment of the total of the principal items of that judgment " with such additional sums as may be necessary to pay interest, as authorized by law "; and that such Act did not require the compounding of interest. Neither the subsequent Act of March 4, 1909 (35 Stat. 907) nor the Act of June 30, 1919 (41 Stat. 3) had any application whatever to Item 3 of this judgment. Therefore, we submit that there was nothing in the law requiring the compounding of interest.

Now let us see what the Government has paid under this item. (R. 22.) The principal was

$432.28. Interest at 5% was computed from January 1, 1874 to December 29, 1905 (the date of filing the transcript in the Treasury). Upon the total of the original principal and this interest, additional interest at 4% was computed from December 30, 1905 (the date of filing the transcript in the Treasury), to May 14, 1906 (the date of the issue of the mandate by this Court). This interest at 4%, as we have already seen in connection with the other items of this judgment, was paid under the Act of September 30, 1890 (26 Stat. 504, 537), and was, as heretofore shown, improper. The total amount of principal and $708.21 interest was paid on July 2, 1906. (R. 23.) Interest at 5% upon $432.28 from January 1, 1874, to July 2, 1906, amounts to $702.44, and therefore upon Item 3 appellant has also been overpaid.

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SUPREME COURT OF THE UNITED STATES.

No. 198.—October Term, 1925.

The Cherokee Nation, Appellant, vs. The United States. } Appeal from the Court of Claims.

[April 12, 1926.]

Mr. Chief Justice Taft delivered the opinion of the Court.

In 1905, this Court affirmed a judgment of the Court of Claims for the principal of and the interest on four amounts due from the United States to the Cherokee Nation, (*Cherokee Nation* v. *United States*, 202 U. S. 101: s. c. 40 Ct. Cls. 252). The interest allowed in the judgment was five per cent. on the four claims from the accruing of liability to their payment. Since that judgment and its payment in full, the Cherokee Nation has presented to Congress the claim that more than simple interest was due, that the principal and interest due in 1895 should have been regarded as a lump sum, and that thereafter interest on the total at five per cent. to the time of payment should have been allowed. This if granted would be an additional sum of $2,216,091.76 with five per cent. interest from the dates of previous credits till paid. A special Act of Congress of March 3, 1919, 40 Stat. 1316, c. 113, provides in part as follows:

"That jurisdiction is hereby conferred upon the Court of Claims to hear, consider, and determine the claim of the Cherokee Nation against the United States for interest, in addition to all other interest heretofore allowed and paid, alleged to be owing from the United States to the Cherokee Nation on the funds arising from the judgment of the Court of Claims of May eighteenth, nineteen hundred and five (Fortieth Court of Claims Reports, page two hundred and fifty-two) in favor of the Cherokee Nation. The said court is authorized, empowered, and directed to carefully examine all laws, treaties, or agreements, and especially the agreement between the United States and the Cherokee Nation of December nineteenth, eighteen hundred and ninety-one, ratified by the United States, March third, eighteen hundred and ninety-three (Twenty-seventh

Statutes at Large, page six hundred and forty, section ten), in any manner affecting or relating to the question of interest on said funds, as the same shall be brought to the attention of the court by the Cherokee Nation under this act. And if it shall be found that under any of the said treaties, laws, or agreements interest on one or more of the said funds, either in whole or in part, has not been paid and is rightfully owing from the United States to the Cherokee Nation, the court shall render final judgment therefor against the United States and in favor of the Cherokee Nation, either party to have the right to appeal to the Supreme Court of the United States as in other cases."

It is not necessary to recount the long and intricate history of the relations between the United States and the Cherokee Nation. It is complicated by the division between Cherokees into the Eastern Cherokees who wished to become civilized and remain in the States east of the Mississippi, and those who preferred nomadic and hunting life in the West, and who first went to the Indian Territory and were called the Old Settlers. Ultimately the Eastern Cherokees were removed to the same place, and they and the Old Settlers were united in a common government again by the Treaty of 1846 (9 Stat. 871). The sale and purchase and transfer of lands east and west of the Mississippi, the distribution of these, the cost of removal of the various bands of the Nation to Indian Territory, and other transactions involving expense were the subject of discussion and dispute between the Government and the Nation and its different bands. In avowed conformity with the Treaty of 1846, Congress appropriated in 1852, the sum of $724,603 "in full satisfaction and final settlement of all claims and demands whatsoever of the Cherokee Nation against the United States." (9 Stat. 573, c. 12.) A full and final discharge was accordingly signed by the representatives of the Cherokee Nation, but under protest. Other claims, however, were thereafter made and paid, one of nearly $190,000 to the Old Settlers. Then in a case of *The Old Settlers* v. *United States,* 27 Ct. Cls. 1, affirmed by this Court in 148 U. S. 427, a judgment for $212,376.94 with interest from 1838 and an additional $4,100 was given them.

In 1889, the United States desired to buy from the Cherokees what was known as the Cherokee Outlet in Oklahoma, embracing 8,000,000 acres for settlement as public land. Under the authority of section 14 of the Act of March 2, 1889, 25 Stat. 1005, an agreement was made December 19, 1891, by the United

States with the Cherokee Nation, by the first article of which the Cherokee Nation agreed to convey to the United States, 8,144,682.91 acres between the 96th and 100th degree of west longitude, south of the Kansas line, and commonly known as the "Cherokee outlet."

The fourth article of the agreement was as follows:

"Fourth. The United States shall, without delay, render to the Cherokee Nation, through any agent appointed by authority of the national council, a complete account of moneys due the Cherokee Nation under any of the treaties ratified in the years 1817, 1819, 1825, 1828, 1833, 1835, 1836, 1846, 1866, and 1868, and any laws passed by Congress of the United States for the purpose of carrying said treaties, or any of them, into effect; and upon such accounting should the Cherokee Nation, by its national council, conclude and determine that such accounting is incorrect or unjust, then the Cherokee Nation shall have the right within twelve (12) months to enter suit against the United States in the Court of Claims, with the right of appeal to the Supreme Court of the United States by either party, for any alleged or declared amount of money promised but withheld by the United States from the Cherokee Nation, under any of said treaties or laws, which may be claimed to be omitted from or improperly or unjustly or illegally adjusted in said accounting; and the Congress of the United States shall at its next session, after such case shall be finally decided and certified to Congress according to law, appropriate a sufficient sum of money to pay such judgment to the Cherokee Nation, should judgment be rendered in her favor; or, if it shall be found upon such accounting that any sum of money has been so withheld, the amount shall be duly appropriated by Congress, payable to the Cherokee Nation upon the order of its national council, such appropriation to be made by Congress if then in session, and if not, then at the session immediately following such accounting."

The Sixth Article was in part as follows:

"Sixth. That in addition to the foregoing enumerated considerations for the cession and relinquishment of title to the lands hereinbefore provided the United States shall pay to the Cherokee Nation, at such time and in such manner as the Cherokee National Council shall determine, the sum of eight million five hundred and ninety-five thousand seven hundred and thirty-six and twelve one-hundredths ($8,595,736.12) dollars in excess of the sum of seven hundred and twenty-eight thousand three hundred and eighty-nine and forty-six one-hundredths ($728,389.46) dollars, the aggregate of amounts heretofore appropriated by Congress and charged against the lands of the Cherokees west of the Arkansas River, and also in excess of the amount heretofore paid by the

Osage Indians for their reservation. So long as the money or any part of it shall remain in the Treasury of the United States after this agreement shall have become effective, such sum so left in the Treasury of the United States shall bear interest at the rate of five per centum per annum, payable semi-annually: Provided, That the United States may at any time pay to said Cherokee Nation the whole or any part of said sum and thereupon terminate the obligation of the United States in respect to so much thereof as shall be so paid and in respect to any further interest upon the same."

On January 4, 1892, the agreement of 1891 was approved by the Cherokee National Council. The agreement was ratified by Congress by section 10 of the Act of March 3, 1893 (27 Stat. 612, 640), which appropriated $295,736, to be immediately available and the remaining sum of eight million three hundred thousand dollars it was provided should be "payable in five equal installments, commencing on the fourth day of March, eighteen hundred and ninety-five, and ending on the fourth day of March, eighteen hundred and ninety-nine, said deferred payments to bear interest at the rate of four per centum per annum, to be paid annually."

The Act further provided that the acceptance by the Cherokee Nation of Indians of any of the money appropriated as therein set forth should be considered and taken and should operate as a full and complete relinquishment, and extinguishment of all the title, claim, and interest in and to said lands of the Cherokee Nation.

The sum of $5,000 was appropriated by the Act to enable the Commissioner of Indian Affairs, under the direction of the Secretary of the Interior, "to employ such expert person or persons to properly render a complete account to the Cherokee Nation of moneys due said Nation, as required in the fourth subdivision of Article II of said agreement."

On May 17, 1893, a deed of cession was executed and delivered by the proper authorities of the Cherokee Nation to the United States and the first installment of the purchase money was paid to and accepted by the Cherokee Nation and the United States thereupon took possession of said lands, and thereafter disposed of the same. The other installments were duly and seasonably paid.

In pursuance of the Act of March 3, 1893, *supra,* the Secretary of the Interior promptly employed two expert accountants, Messrs.

James A. Slade and Joseph T. Bender, to prepare an account between the United States and the Cherokee Nation, and on April 28, 1894, they filed it with the Secretary. The amounts due the Cherokee Nation were summed up as follows:

Under the treaty of 1819:
Value of three tracts of land containing 1700 acres, at $1.25 per acre, to be added to the principal of the "school" fund $2,125.00
(With interest from Feb. 27, 1819, to date of payment.)

Under treaty of 1835:
Amount paid for removal of Eastern Cherokees to the Indian Territory, improperly charged to treaty fund $1,111,284.70
(With interest from June 12, 1838, to date of payment.)

Under treaty of 1866:
Amount received by receiver of public moneys at Independence, Kans., never credited to Cherokee Nation $432.28
(With interest from Jan. 1, 1874, to date of payment.)

Under act of Congress March 3, 1893:
Interest on $15,000 of Choctaw funds applied in 1863 to relief of indigent Cherokees, said interest being improperly charged to Cherokee national fund.... $20,406.25
(With interest from July 1, 1893, to date of restoration of the principal of the Cherokee funds, held in trust in lieu of investments.)

This was transmitted by the Secretary of the Interior to the proper authorities of the Cherokee Nation and it was accepted by act of the National Council approved December 1, 1894. It was then transmitted by the Secretary to Congress on January 7, 1895. The principal due on said account on March 4, 1895, was $1,134,248.23, and the interest was $3,162,279.34.

Instead of making an appropriation for this amount, Congress on March 2, 1895, referred the report of the Secretary of the Interior to the Attorney General and authorized and directed him to review the conclusions of law reached by the Department of the Interior in the account and report his conclusions at the next regular session. (28 Stat. 795, c. 177.) The Attorney General made his report December 2, 1895, which differed with the report of the Secretary of the Interior and the Slade and Bender report, hold-

ing that under the Treaty of 1846 and the settlement of 1852 by appropriation of Congress, the Cherokees were properly charged with the expense of removal and that the item 2 of $1,111,284.70 in the report was improperly charged to the United States. No action was taken in settlement of the matter by Congress until July 1, 1902, when by section 68 of the Act of July 1, 1902 (32 Stat. 726) it referred the claims to the Court of Claims, as follows:

"Jurisdiction is hereby conferred upon the Court of Claims to examine, consider, and adjudicate, with the right of appeal to the Supreme Court of the United States by any party in interest feeling aggrieved at the decision of the Court of Claims, any claim which the Cherokee Tribe, or any band thereof, arising under treaty stipulations, may have against the United States, upon which suit shall be instituted within two years after the approval of this act; and also to examine, consider, and adjudicate any claim which the United States may have against the said tribe, or any band thereof. . . ."

Under this Act, the Cherokee Nation brought suit against the United States, claiming the whole amount with interest found due by the Slade and Bender account. Thereafter the Eastern Cherokees and the Eastern and Emigrant Cherokees each brought suit under the Act of July 1, 1902, as amended by the Act of March 3, 1903, against the United States, each claiming the removal fund of $1,111,284.70. The three suits were consolidated by order of the court, and were heard, considered, and decided together. The decree of the Court of Claims, in conformity with its opinion and conclusion of law entered March 20, 1905, was in part as follows:

"It is, this 18th day of May, A. D., 1905, adjudged, ordered, and decreed that the plaintiff, the Cherokee Nation, do have and recover of and from the United States as follows:

Item 1: The sum of..... $2,125.00
With interest therefrom at the rate of 5 per cent from Feb. 27, 1819, to date of payment.

Item 2: The sum of.....$1,111,284.70
With interest thereon at the rate of 5 per cent from June 12, 1838, to date of payment.

Item 3: The sum of..... $432.28
With interest thereon at the rate of 5 per cent from Jan. 1, 1874, to date of payment.

Item 4: The sum of..... $20,406.25
With interest thereon from July 1, 1903, to date of payment."

Then followed directions as to the payment and distribution of the different items of the judgment. (40 Ct. Cls. 252, 363, 364.)

The case having come to this Court on appeal, the judgment was affirmed on April 30, 1906, with a modification, consisting of a direction that item two, $1,111,284.70, with interest at 5 per cent. from June 12, 1838, to date of payment, should be distributed among 'the Eastern Cherokees as individuals, whether east or west of the Mississippi, parties to the treaties of 1835-36 and 1846, and exclusive of Old Settlers.' (202 U. S. 101, 130, 131). On May 28, 1906, the Court of Claims entered a decree modifying its original decree to conform to the mandate of the Supreme Court. In attempted satisfaction of the judgment of the Court of Claims, as modified by the Supreme Court, and as directed by subsequent appropriation acts, there has been paid to the Cherokee Nation the sum of $5,158,005.54.

The Court of Claims held in the case before us that the plaintiff was not entitled to recover any more interest and its petition was dismissed; hence this appeal.

The first question for our consideration is the effect of the Act of 1919 in referring the issue in this case to the Court of Claims. The judgment of this Court in the suit by the Cherokee Nation against the United States in March, 1905 (202 U. S. 101), already referred to, awarded a large amount of interest. The question of interest was considered and decided, and it is quite clear that but for the special Act of 1919, above quoted, the question here mooted would have been foreclosed as *res judicata.* In passing the Act, Congress must have been well advised of this, and the only possible construction therefore to be put upon it is that Congress has therein expressed its desire, so far as the question of interest is concerned, to waive the effect of the judgment as *res judicata,* and to direct the Court of Claims to re-examine it and determine whether the interest therein allowed was all that should have been allowed, or whether it should be found to be as now claimed by the Cherokee Nation. The Solicitor General representing the Government properly concedes this to be the correct view. The power of Congress to waive such an adjudication of course is clear. See *Nock* v. *United States,* 2 Ct. Cls. 451; *Braden* v. *United States,* 16 Ct. Cls. 389, and *United States* v. *Grant,* 110 U. S. 225. Compare *United States* v. *Realty Company,* 163 U. S. 427; *Allen* v. *Smith,* 173 U. S. 389, 393, 402; *United States* v. *Cook,* 257 U. S.

523, 527; *Work* v. *United States ex rel. Rives,* 267 U. S. 175, 181; *Mitchell* v. *United States,* 267 U. S. 341, 346.

There is nothing before us which indicates that the present claim for a rest in the matter of interest in 1895, was presented either to the Court of Claims or to this Court. It is a new argument not before considered. The argument is that the consideration for the land to be conveyed under the agreement of 1891 was not only the eight and a half millions of dollars to be paid, but also the appropriation by Congress of money to pay the old accounts long due, and that the failure of Congress to make the appropriation at the time agreed required that interest thereafter should be awarded upon the lump sum of principal and interest as of that date, in full payment of the purchase money for the land. The claim is that the failure of Congress to make the appropriation as stipulated in the contract became a new *terminus a quo* from which the calculation of interest on everything then due and owing must be calculated.

In taking up this argument, we should begin with the premise, well established by the authorities, that a recovery of interest against the United States is not authorized under a special Act referring to the Court of Claims a suit founded upon a contract with the United States unless the contract or the act expressly authorizes such interest. This is in accord with the general Congressional policy as shown in section 177 of the Judicial Code, providing that no interest shall be allowed on any claim up to the time of the rendition thereon by the Court of Claims, unless upon a contract expressly stipulating for the payment of interest. *Tilson* v. *United States,* 100 U. S. 43, 46; *Harvey* v. *United States,* 113 U. S. 243, 249.

We have already held, in *The Old Settlers* case, *supra,* and in *United States* v. *The Cherokee Nation, supra,* that in the past financial dealings between the United States and the Cherokee on debts due from the former to the latter, interest at five per cent. until payment was to be allowed as if stipulated. This result followed from a decision by the Senate of the United States acting as umpire between the two parties in 1850. In that capacity it adopted the following resolution:

"Resolved, That it is the sense of the Senate that interest at the rate of 5 per cent per annum should be allowed upon the sums found to be due to the Eastern and Western Cherokees respectively, from the 12th day of June, 1838, until paid."

Thus it was that the accountants Slade and Bender reported that interest at five per cent. until paid should be allowed the Cherokees not only on the items which were due in 1850, but also on those which had accrued since, and by the ratification of their report by both parties, interest thus calculated becomes a stipulated term in respect of the issue before us.

It is contended, however, by counsel for the Cherokee Nation, that the decision of this Court in 1906 so treats the breach of the contract by the Government in failing to make the appropriation in 1895 as to justify the claim that it was more than a mere continuance of the failure to pay, that it was a new breach of a new contract, requiring interest as upon a new default in a new debt of the sum total of the original claim with interest added down to 1895.

We can not ascribe such an effect to the decision referred to. The chief controversy in that case was as to the liability of the Government at all for the removal expenses of the Eastern Cherokees. It was argued on its behalf, as the report of the case in the Court of Claims shows (40 Ct. Cls. 252, 307), that Slade and Bender were merely accountants employed by the Government to state the account and not to pass on the legal validity and effect of the Treaty of 1846 and the scope of the settlement evidenced by the appropriation and the signed releases of 1852, that the Cherokees were not bound by the report as an account stated or settled but were given full right by the agreement of 1891 to contest its correctness and to resort to Court in respect to it, and that the Government could not be bound by such a report in which the accountants exceeded their authority as mere accountants and exercised their functions as if authorized to act as arbitrators or umpires. This Court stated its adverse conclusion on this point by quoting and approving the language of Chief Justice Nott in the Court of Claims (202 U. S. 101 at pp. 122, 123) as follows:

"The court does not intend to imply that when the account of Slade and Bender came into the hands of the Secretary of the Interior he was bound to transmit it to the Cherokee Nation. On the contrary, the Cherokee Nation had not agreed to be bound by the report of the accountants and could not claim that the United States should be. The accountants were but the instrumentality of the United States in making out an account. When it was placed in the Interior Department it was as much within the discretion

of the Secretary to accept and adopt it or to remand it for alterations and corrections as a thing could be. He was the representative of the United States under whom the agreement had been made, and he was the authority under which the account had been made out, and when he transmitted it to the Cherokee Nation his transmission was the transmission of the United States. When the account was thus received by the Cherokee Nation (May 21, 1894), the 'twelve months' of the agreement, within which the Nation must consider it and enter suit against the other party in the Court of Claims, began to run, and with the Nation's acceptance of the account (December 1, 1894) the session of Congress at which an appropriation should be made became fixed and certain. The Secretary did not recall the account; the United States never rendered another, and the utmost authority which Congress could have exercised, if any, was, at the same session, or certainly within the prescribed 'twelve months', to have directed the Secretary to withdraw the account and notify the Cherokee Nation that another would be rendered. The action of the Secretary of the Interior, combined with the inaction of Congress to direct anything to the contrary, makes this provision of the agreement final and conclusive. The Cherokee Nation has parted with the land, has lost the time within which it might have appealed to the courts, and has lost the right to bring the items which it regards as incorrectly or unjustly disallowed to judicial arbitrament, and the United States are placed in the position of having broken and evaded the letter and spirit of their agreement."

All this, however, was directed to the question of the liability of the United States to pay the principal debt. The Court then proceeded to find the interest due as directed in the Slade and Bender account without any suggestion of a rest for interest in 1905, or anything other than simple interest at five per cent. until paid.

When we consider the rule requiring an express provision of contract or statute to justify the imposition of interest in adjudicating any claim against the United States, we can find nothing in the circumstances of this case to increase the interest as adjudged. The additional interest now claimed is sought really as damages for the delay of Congress in appropriating the sum due in 1895 as the United States promised in the 1891 agreement. But the rule as to interest against the United States does not allow us to adjudge interest as damages at all. Congress must expressly provide for it or the contract must so provide. The only contractual obligation here is for simple five per cent. interest until payment.

What the appellant here seeks is compound interest, that is interest on interest from 1895 until now. The general rule even as be-

tween private persons is that in the absence of a contract therefor or some statute, compound interest is not allowed to be computed upon a debt. *Whitcomb* v. *Harris,* 90 Me. 206; *Bradley* v. *Merrill,* 91 Me. 340; *Ellis* v. *Sullivan,* 241 Mass. 60, 64; *Tisbury* v. *Vineyard Haven Water Company,* 193 Mass. 196; *Lewin* v. *Folsom,* 171 Mass. 188, 192; *Wallace* v. *Glaser,* 82 Mich. 190; *Blanchard* v. *Dominion National Bank,* 130 Va. 633, 637; *Finger* v. *McCaughey,* 114 Cal. 64, 66; *Cullen* v. *Whitham,* 33 Wash. 366, 368. In view of the care with which Congress and this Court in interpretation of the legislative will have limited the collection of simple interest against the Government *a fortiori* must compound interest be denied to appellant unless provision therefor is made in the contract of 1891 or in the statute of 1919 authorizing this suit, and it is to be found in neither.

Further support for the claim of the appellant is said to be found in the sixth article of the agreement, quoted above, in the language, "so long as the money or any part of it shall remain in the Treasury of the United States after this agreement shall have become effective, such sums so left in the Treasury of the United States shall bear interest at rate of 5 per cent. per annum, payable semiannually." It is said that this should be construed to refer not only to the balance unpaid of the $8,595,736.12, but also to the money on the old claims found to be due under the agreement, because payment of the latter was part of the consideration for the land. A careful examination of the sixth article shows that this clause referred only to the new money consideration to be paid, and really only to the part of that which, after it fell due and was ready for payment, should be voluntarily left in the Treasury by the Cherokee Nation. It did not even refer to the originally deferred payments because those payments were to bear only four per cent. interest. In any view, it did not and could not refer to amounts due on past account because at the time the agreement of 1891 was made they were not fixed in amount and awaited a possible adjudication to determine them and full treatment of them was given in article 4 of the agreement. The sixth article did not apply to them at all.

It is further argued that the payment of compound interest is to be supported here under the provisions of the Treaty of June 19, 1866, 14 Stat. 799, 805, which reads as follows:

"All funds now due the Nation, or that may hereafter accrue form the sale of their lands by the United States as hereinbefore

provided for, shall be invested in United States registered stocks a
their current value, and the interest on all such funds shall be paid
semi-annually on the order of the Cherokee Nation."

And by section 3659 of the Revised Statutes, re-enacting section 2
of the Act of Congress of September 11, 1841, 5 Stat. 465, which
provides:

"All funds held in trust by the United States, and the annual
interest accruing thereon, when not otherwise required by treaty
shall be invested in stocks of the United States, bearing a rate of
interest not less than five per centum per annum."

It is urged that the largest item of $1,114,000 was taken out of a
$5,000,000 trust fund held by the United States for the benefit of
the Cherokees and therefore that it should be treated as if it were
always in the Treasury of the United States held in trust for the
Indians, and as if the United States had collected the interest
thereon out of the invested stocks and had refused to pay it over as
annuities to the Indians. This claim proves too much. It would
require compound interest brought about by annual or semi-annual
rests for near a century, an amount that the Solicitor General
suggests would be equal to the National debt. The argument is
shown to be wholly without support in the circumstance that the
Cherokees and the United States, by the resolution of the Senate
in 1850, agreed upon the interest for such debts as that of five per
cent. until paid. Moreover the ratification by the Cherokees of
the Slade and Bender Report foreclosed any such claim.

After the judgment was rendered in 1906 by this Court affirming
that of the Court of Claims, the Treasury had some difficulty in
deciding how the interest was to be calculated on the amounts
declared in the judgment. We have no doubt that the judgment
should have been paid in accordance with its exact terms, namely
with simple interest down to the time of actual payment, and that
the intervention of the judgment of 1906 made no difference in the
calculation of the interest. This is the necessary effect of the
judgment.

The Treasury was troubled by the provision of September 30,
1890, 26 Stat. 504, 537, which provides as follows:

"That hereafter it shall be the duty of the Secretary of the
Treasury to certify to Congress for appropriation only such judg-
ments of the Court of Claims as are not to be appealed, or such
appealed cases as shall have been decided by the Supreme Court to
be due and payable. And on judgments in favor of claimants

which have been appealed by the United States and affirmed by the Supreme Court, interest, at the rate of four per centum, shall be allowed and paid from the date of filing the transcript of judgment in the Treasury Department up to and including the date of the mandate of affirmance by the Supreme Court: Provided, That in no case shall interest be allowed after the term of the Supreme Court at which said judgment was affirmed."

It is quite clear that the statute applies where judgments against the United States bear no interest, and certainly not to one in which the judgment itself provides for a certain rate of interest after its entry. The above statute was framed in order to impose a penalty on the United States for its unsuccessful effort by appeal to defeat the judgment against it. It only allows interest pending the appeal from the date of filing the transcript in the Treasury Department to the date of the mandate of affirmance. The Treasury Department seems to have applied this statute with respect to all the four items of the judgment of 1906.

By the Act of June 30, 1906, 34 Stat. 634, 664, Congress made appropriation for the payment of the judgment of the Court of Claims, principal and interest, as follows:

"To pay the judgment rendered by the Court of Claims on May eighteenth, nineteen hundred and five, in consolidated causes numbered twenty-three thousand one hundred and ninety-nine, The Cherokee Nation versus The United States; numbered twenty-three thousand two hundred and fourteen, The Eastern Cherokees versus The United States; and numbered twenty-three thousand two hundred and twelve, The Eastern and Emigrant Cherokees versus The United States, aggregating a principal sum of one million one hundred and thirty-four thousand two hundred and forty-eight dollars and twenty-three cents, as therein set forth, with interest upon the several items of judgment at five per centum, one million one hundred and thirty-four thousand two hundred and forty-eight dollars and twenty-three cents, together with such additional sum as may be necessary to pay interest, as authorized by law."

This Act was further amended by the Act of March 4, 1909, 35 Stat. 907, 938, 939, as follows:

"That the general deficiency appropriation act of June thirtieth, nineteen hundred and six, so far as the same provides for the payment of item two of the judgment of the Court of Claims of May eighteenth, nineteen hundred and five, in favor of the Eastern Cherokees, shall be construed as to carry interest on said item two up to such time as the roll of the individual beneficiaries entitled

to share in said judgment shall be finally approved by the Court of Claims, and for the payment of said interest a sufficient sum is hereby appropriated."

Then by Section 18 of the Act of June 30, 1919, 41 Stat, 3, 21, Congress provided for the payment of certain interest on items 1 and 4 of the judgment. The provision in this section as to item 1 seems to have been largely an overpayment. That as to item 4 seems also to have involved a considerable overpayment though it also included ten years' interest due on the principal under the judgment which by the Government's error was not embraced in the payment under the Act of 1906.

The sum of all payments actually made under the judgment of 1905 was as follows:

On July 2, 1906, to the Secretary of the Interior on account of said item 1	$11,520.46
On the same date on account of item 3	1,140.49
On the same date on account of item 4	23,294.93
On July 14, 1906, to the attorneys for the Eastern Cherokees and the Eastern Emigrant Cherokees, fees amounting to	740,555.42
On Nov. 3, 1906, to the attorneys for the Cherokee Nation on account of item 2, fees amounting to	148,245.15
On various dates after July 2, 1906, and before final distribution of the fund arising from item 2, to Guion Miller for fees and expenses the sum of	103,749.74
On and after Mar. 15, 1910, to Guion Miller for per capita distribution among the Cherokees entitled to share in the fund the sum of	4,105,810.77
On or about Aug. 7, 1919, additional interest on item 4, pursuant to the act of June 30, 1919	21,502.86
On or about Aug. 7, 1919, to the Secretary of the Interior as additional interest on item 1, pursuant to the said act of June 30, 1919	2,185.72
Making a total sum, principals and interest of	$5,158,005.54

The delay in the payment of the largest item was due to the desire to comply with the ruling of the Court of Claims, concurred in by this Court, that the money of the large claim should be distributed to the individual members of the Eastern Cherokees according to rolls to be made up of those individuals. 40 Ct. Cls. 332, 202 U. S. 119, 130. This is what led to the amendment of 1909.

It is quite clear that the mistake made by the Treasury, and by Congress, too, in attempting to carry out the judgment of this

Court, was in assuming first that 4 per cent. should be allowed on the total of all items and interest between the date of filing the transcript of the judgment in the Treasury Department and the date of the mandate of affirmance by the Supreme Court, as already pointed out. A further mistake was made in calculating interest at 5 per cent. after the date of affirmance by this Court on the total of the judgment and the interest until final payment. It should have been confined to interest on the principal sums. The eighth finding of the Court of Claims shows in more or less detail how the interest was calculated. The methods adopted we have already criticised. The Solicitor General in his brief makes it evident that in the case of no one of the four items is the amount which has been actually paid less than that which should have been paid down to the day of payment, in accordance with the judgment, including the principal and 5 per cent. simple interest to the date of payment. There is no attempt on the part of the appellant to question the demonstration of this fact. The truth is that the errors in the calculation increased by a substantial sum the amounts which under the judgment should have been paid. As this was more favorable than it should have been to the Cherokees, they can not complain. On this appeal, under the Act of 1919, and in compliance with its requirement, we hold that there is no more interest due to the Cherokees beyond that which they have already received. The Government is not in a position, in view of the fact that the errors referred to have been embodied in legislation, and the overpayments have been made by direction of Congress, to seek to recover them back. Indeed it has not attempted to do so. The judgment of the Court of Claims is

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.